

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

EAST BUFFET AND RESTAURANT, INC.

and

**Case Nos. 29-CA-27114
29-CA-27220
29-CA-27368
29-CA-27724**

318 RESTAURANT WORKERS' UNION

***Sharon Chau, Esq.*, Brooklyn, NY,
for the General Counsel.**

***Lewis Goldberg, Esq.*, (*Goldberg and Weinberger LLP*), Redding, CT,
for the Respondent.**

***Yvonne Brown, Esq.*, Brooklyn, NY,
for the Union.**

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based upon charges filed by 318 Restaurant Workers' Union (Union) in Case Nos. 29-CA-27114, 29-CA-27220, 29-CA-27368, and 29-CA-27724 on August 12 and October 20, 2005, and on January 13 and June 2, 2006, respectively, a complaint was issued on June 30, 2006 against East Buffet and Restaurant, Inc. (Respondent).¹

The complaint alleges that the Respondent unlawfully discharged David Lee and thereafter engaged in numerous violations of the Act because its employees (a) protested the discharge (b) joined the Union and engaged in union activities and (c) engaged in other protected concerted activities. Those alleged violations included unlawfully interrogating employees, threatening them, creating the impression of surveillance, informing employees that joining the Union would be futile, subjecting them to closer supervision, complaints and harsh criticism over the performance of their duties, assigning them to additional and less desirable duties which they had never performed before, reassigning more desirable work from waiter employees to buspersons, directing employees not to speak to or eat with other employees or to accept cell phone calls while on duty, and issuing a disciplinary warning to employee Yu Chuan Chu. Finally, the complaint alleges that the Respondent failed to reinstate unfair labor practice strikers upon their unconditional offer to return to work.

¹ The Respondent's answer denied knowledge or information concerning the filing and service of the charges. My review of the formal papers in evidence including the affidavits of service of the charges establishes that they were filed and served as alleged in the complaint.

The Respondent's answer denied the material allegations of the complaint and on September 18-21 and October 18-20, 2006, a hearing was held before me in Brooklyn, New York.

5 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

Findings of Fact

10 I. Jurisdiction

The Respondent, a domestic corporation having its office and place of business at 179 Walt Whitman Road, Huntington Station, New York, is engaged in the operation of a buffet restaurant. During the past year it derived gross annual revenues in excess of \$500,000 and purchased and received goods and supplies valued in excess of \$5,000 directly from suppliers located outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. The Alleged Unfair Labor Practices

A. Background

25 The Respondent was opened in 1988 by its owners Sauman (Susan) Kong and her husband Kan Pat Kong. Their son, Kevin Kong, is the general manager. ² The restaurant, which serves a Chinese food cuisine, employs two captains, James and Evelyn, a cashier/hostess and about 20 dining room employees, including waiters, waitresses and busepersons³. There is also a kitchen staff and one cleaning person who cleaned the bathrooms and washed the tables and floors. The restaurant is buffet-style with the customers being shown to a table by the hostess and then obtaining their food at various buffet tables.

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Each member of the wait staff is assigned to certain tables.⁴ They take special food orders, bring drinks, clear the tables of dirty dishes, and also bring the check to the table. Customers may pay their bill to the waiter or at the cashier's desk. Kevin Kong stated that the waiter must keep his area clean, count the number of customers at the table and enter that amount in the computer, and ensure that customers pay their bills. Tables for the customers are designated by letter and number and are located in different sections of the restaurant. There is also an eleven table "party room" where customers can eat, and where the employees eat their meals.

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Employees arrive at work at 11:00 a.m. at which time they prepare the restaurant for its opening to customers at 12:00 p.m. The restaurant is closed to new customers at 3:00 p.m., but

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² The Respondent stipulated that all three Kongs are statutory supervisors of the Respondent.

³ The busepersons were referred to as busgirls and busboys and where necessary, such designations will be used herein.

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⁴ Employees' Chinese and English names were used interchangeably at the hearing. Their names are listed here: Ping Zhang (Ivy); Bi Chen (Becky); Jenny, Yu Chuan Chu (Michael); David Lee; Xiu Zhu Lin (Sammy); Li Feng Liu (Tommy); Hui Ma (Mark); Yu Zhen Wang (Amy).

of course customers who are still eating are permitted to stay. The restaurant reopens at 4:30 p.m. for dinner. New customers are denied entry at 9:00 p.m. on weekdays and 10:00 p.m. on Saturday and Sunday. On weekdays the restaurant closes at 10:00 p.m.

5 From Monday through Thursday, there are generally four waiters and three busgirls assigned to the dining room.⁵ On Friday through Sunday, the busiest nights of the week, seven waiters and one part-time waiter, four busgirls, seven or eight busboys, two captains and two hostesses are present during dinner.⁶ The busboys' morning duties include sweeping and mopping the floor and making ice, but during dinner they assist the waiters by bringing drinks to
10 customers' tables and removing dirty dishes. The busgirls worked as dish transporters and also maintained and cleaned the buffet tables and surrounding floor area. They are not responsible for the tables assigned to the wait staff.

15 The employees eat their lunch and dinner meals at the restaurant with food provided by the Respondent. The lunch meal is usually taken at 3:00 p.m. and the dinner meal at 9:00 p.m. They eat their meals in two, fifteen-minute shifts, with some of them eating while others serve the customers. After eating their meals, the wait staff continues to serve their customers.

20 After the employees' lunch meal they have much "side work" to do including cutting vegetables and fruit. After the dinner meal they continue to work cleaning the restaurant and returning food to the refrigerator until about 10:00 p.m. when the restaurant closes and they leave. The Respondent provides vans which take a number of employees from their homes in Queens to the restaurant in Suffolk County, Long Island. Other employees drive their own
25 vehicles to work.

B. The Captains

30 Prior to April, 2005, only one captain, James, was employed at the restaurant. In March or April, Evelyn, a former waitress, was appointed as an additional captain.⁷ Kevin Kong stated that both captains have the same authority and responsibilities.⁸ The captain reports to work each day arriving at 11:00 a.m. at which time he unlocks the restaurant door. At those times Kevin Kong may or may not be there. Kevin usually arrives at 3:00 or 4:00 p.m. three or four times per week. When the captain is at the restaurant alone with the waiters and buspersons, he has the highest authority of anyone in the restaurant. However, Kevin Kong stated that if any
35 problem arose the captain contacted Kevin by phone. For example, when an employee came to work sick James called Kevin who told him to send the worker home. If a worker called in sick, James called Kevin who volunteered to try to find another employee. In addition, when an employee told James that he needed time off James asked Kevin since James has no authority to release the worker.

40 Kevin Kong stated that the captain's duties included bartending and occasionally acting as cashier and host. He assigns waiters and busboys to the section of the restaurant in which

⁵ The three busgirls were Yu Zhen Wang, Ping Yuan Wu, and Ping Zhang.

⁶ On weekdays one waiter is assigned to each section of the restaurant, and on weekends two waiters and two busboys are assigned to each section.

⁷ At the time of the hearing, James and Raymond Moi were captains. Evelyn was no longer a captain, having left that position in September, 2005 and returned to her unit position as a waitress.

⁸ Page 834, lines 2-3 of the transcript is hereby corrected to read that "Evelyn" not
50 "everyone" has the same authority as James.

they will work. In making such assignments he simply looks at the prior day's assignment and rotates the employees to a different section than the one they worked in the day before. The skills of the employee played no part in the assignment. Kevin Kong told the captains to rotate the waiters and busboys among the various table sections. The captain also helps clear tables occasionally, helps clean food spills and obtains drinks for customers.

Mrs. Kong testified that new waiters are trained by the more senior waiters and not by the captain. Kevin Kong testified that the captains have no authority to hire, fire, discipline, or warn employees and no captain has disciplined or recommended the discipline of any worker. However, the captain notifies Kevin Kong if there is an altercation among employees, or if an employee is not working properly. In those instances Kevin Kong does an "independent investigation." Kong cited two instances where James informed him that a waitress was not cleaning tables when customers were waiting and that a busboy was drinking beer on duty. Kong spoke to the employees in question and corrected their work performance.

The captain has no authority to send a worker home before the end of his shift because of a violation of the restaurant's rules. He cannot assign overtime work, grant an employee's request for time off, and does not direct the waiter's routine duties. If overtime work is needed, James has no authority to authorize such work, and instead contacts Kevin. Written rules provide that the employees must listen to the instructions of the manager and the captain, and that "if anything happens the manager or the captain must be notified immediately so that they can take care of those matters." In addition, another rule provides that any difficulty regarding a customer must be immediately reported by the wait staff to the captain so that he can resolve it. The wait staff was directed not to try to resolve the problem by themselves.

Kevin Kong stated that when the Kongs were not present, the captain has the authority to tell a busboy that a customer has left and the table should be cleaned, and if a customer has a complaint or needed to make a reservation James would handle those matters. However, the captain is expected to inform Kevin regarding matters which are "out of the ordinary."

Employee Li Feng Liu testified as to the captain's duties. He stated that when the workers arrive at work James or Kevin Kong posts a sheet of paper listing the table assignments of the wait staff for that day. Liu stated that the captain corrects errors made by the wait staff in customers' bills. The wait staff reported any incidents that required reporting to the captains.

Kevin Kong's basement office consists of an outer room containing linens, mints and tablecloths. The captain has the key to that office so that he can obtain those supplies as needed. However, the captain does not have the key to Kong's inner office which contains personnel files. The captain also has a key to the cash register because he occasionally acts as cashier. In this respect, Kevin Kong stated that only management personnel, the captains or the cashier/host is permitted to touch the cash register. The captain may make changes in the computer such as correcting the number of customers at a table thereby changing a figure entered by a waiter. However, the captain cannot cancel a check but he can give a discount to a customer who complained of poor service. The latter instance never came to the attention of Kevin Kong. Captains share in the tips left by customers.

Kevin Kong stated that his parents were out of the country in May and June, 2005, and returned in mid July. He was away from the restaurant for the first half of July. During their absence, captains James and Evelyn worked in the restaurant, and Kevin's brother Jim Kong acted as manager.

C. The Visit by the Department of Labor

Mrs. Kong testified that she first learned by letter received prior to March, 2005 that the Department of Labor (DOL) would be conducting an investigation of the Respondent. The letter advised that the DOL would be inquiring into the hours of work and pay rate of the Respondent's employees. Mrs. Kong hired an attorney. In response to the investigation, the Respondent thereafter listed the number of hours worked on employee pay stubs.

The day before the visit by DOL agents in March, 2005, the employees were told by manager Kevin Kong and captain James that on the following day the DOL would visit the restaurant to "check on us." The workers were instructed to wait outside the restaurant during the visit and not enter until they were called.

Employee Liu entered the restaurant at about 10:45 a.m. and was told by Susan Kong that the DOL agents were still present and that he should not come in.

Liu phoned David Lee and told him that since he was a documented worker he was entitled to enter the restaurant before being told to do so. Accordingly, Lee entered the restaurant at his usual work time, 11:00 a.m., because he did not believe that he was included in the exclusion order and because he wanted to meet the DOL agents, one of whom immediately waved him over upon his arrival. He approached the table where the agent was speaking to Mrs. Kong. The agent asked him his position, and when he said that he was a waiter, the agent asked him to be seated and asked Mrs. Kong to leave. Mr. and Mrs. Kong stood behind him nearby at the cashier's desk. The agent asked how he was being paid, and Lee answered that his wages were partly in cash and partly by check. Lee asked the agent if he could ask a question and she gestured that he could call her and gave him business cards under the table.

After the agents left, Mrs. Kong told Lee that although he had been working in the restaurant for such a long time (one year) how could he have told the agent that he was paid in cash and by check? Lee answered that Mrs. Kong did not tell him how to answer the questions, and that if he said he was paid by cash or by check she would have found fault with those answers, so he just told the truth. Mrs. Kong told him that in the future the income of the wait staff "will be reported fully."⁹

Shortly before 1:00 p.m. Liu received a phone call telling him to enter the restaurant and he did so immediately. About one hour later Lee gave him and employee Bi Chen business cards of the DOL agent, and told them that they could call the agent if they had any questions. Lee testified that he gave captain James a card, and Liu testified that when Lee distributed the cards Susan Kong and her husband were at a nearby table facing them.

Liu stated that that day he heard captain Raymond tell Kan Pat Kong and also heard captain James tell Raymond essentially that Lee was "playing games with us" by intentionally entering the restaurant during the DOL visit when he was told not to. James did not testify. Mrs. Kong stated that he was on his honeymoon in China during the period of this hearing.

D. The Requirement that the Wait Staff Pay Bills Unpaid by Customers

⁹ Counsel for the General Counsel stated that she is not seeking a finding that that statement is an unfair labor practice.

Prior to March, 2005, it was the Respondent's policy to ask waiters to pay the bills of their customers who left the restaurant without paying. Kevin Kong testified that prior to March, 2005, if a customer failed to pay his check, he investigated the matter by asking the captains and the waiter what happened. If the customer did not pay the bill because of the inattentiveness of the waiter, he asked but did not require the waiter to pay the bill. All of the waiters who were asked to pay did so. If Kong concluded that the customer's failure to pay was not the waiter's fault, he did not ask him to pay. However, Liu testified to one instance in about early March, 2005 in which James told him that a customer left James' table without paying but Kevin did not require him to pay the customer's bill.

The employees were unhappy with this policy and following an instance in January or February, 2005 when Liu was asked to pay the check of his customer who left the restaurant without paying his bill, he met in mid to late March, 2005 with other members of the wait staff including Lee, Ma, Liu, Jenny, Bi Chen and Evelyn who was later promoted to captain. They discussed at lunch that it was unfair that they were required to pay such bills, adding that if they had to do so the money should come from the tip pool because management personnel share in that pool. They also discussed other terms of their employment that they believed were unfair.

Mrs. Kong testified that in response to advice from counsel, but following the visit by the DOL in March, 2005, she changed the Respondent's policy concerning unpaid customer checks. She decided that rather than ask the waiters to pay for unpaid customer checks if it was deemed to be the waiter's fault, they would thereafter give the waiter a written warning and not ask for payment of the unpaid bill. Susan Kong stated that she announced this new policy to the workers but it was not put in writing. Kevin Kong stated that prior to March, 2005, the Respondent did not have a policy of issuing written warning letters for any offense to employees. At the time of the change, Kong did not notify his captains or the employees that the policy had changed and that warning notices would be given instead of asking employees to pay the unpaid customers' bills.

This change to written warnings was testified to by Lee. On April 20, 2005, Lee incorrectly gave a bill for a table of three to a table containing two patrons. That two-customer table erroneously paid the bill. Thus the two-customer table overpaid their bill. Lee testified that Kevin Kong asked him to pay that bill. Lee refused because the bill was not unpaid. Rather, Lee told Kong that there was no loss to the restaurant since the customer overpaid his bill. Lee further told Kong that he had discussed this matter with his co-workers and they decided not to pay for an unpaid customer's bill, but that if Kong insisted, he would have to discuss the matter further with his fellow employees. Lee further told Kong that if the waiters had to pay such bills the captains should contribute to the payment because they share in the tips.

Kevin Kong testified that two days after this incident he told Lee to be more careful about his bills. Lee responded with a "very nasty attitude" saying "if you feel there's a problem why don't you just write me a warning letter." Lee did so. The letter, written on April 22, stated that Lee's work performance was "unsatisfactory, unprofessional and unacceptable." The letter noted that he had made a similar error "a few times before." The letter also stated that if there was no improvement in his performance the Respondent would consider terminating him. Kong testified that he did not ask Lee to pay because the customer was overcharged with no loss to the restaurant, and gave him a warning letter instead.

Counsel for the General Counsel argues that although this warning letter is not alleged as a violation of the Act, it demonstrated management's hostility towards Lee because he refused Kevin Kong's request that he pay the customer's bill.

On April 22, 2005, Bi Chen received a written warning because her customers left without paying their bill. Kevin Kong stated that Chen admitted to him that the customers' failure to pay was her fault. The letter threatened termination unless "immediate correction" occurred. Kevin Kong stated that he orally warned Chen for a similar offense prior to that but had no written record of that oral warning. The two letters to Lee and Chen, both written on April 22, were the first written warnings of any type issued by the Respondent.

On July 16, Lee received a written warning which stated that his work performance was "unsatisfactory" because customers at his table left without paying their bill. The letter noted that "this is your second and final warning. We expect immediate correction of the problem otherwise we shall have no alternative but [sic] consider the termination of your employment." The letter advised that his immediate supervisor was available to answer questions about the letter and "help to improve your performance or correct the difficulties...."

Mrs. Kong testified that regarding this incident the table in question was empty for about 30 minutes and she was then told by Lee that the customer had not paid. She accused Lee of not being attentive to the table inasmuch as 30 minutes passed before he realized that the customers had not paid their bill. Lee explained that the patrons went to the bathroom and did not return. He was preoccupied for only about five minutes with helping other customers pay their bill at the cashier's table and did not notice that they had left the restaurant without paying their bill. Mrs. Kong stated that if a waiter leaves his immediate area to go to the cashier he is still responsible for his table.

It should be noted that the Regional Director dismissed the Union's allegation that the issuance of the April 22 and the July 16 warnings violated the Act, and the General Counsel conceded that she did not seek a finding that those warnings violated the Act. Nevertheless, the Union argues that based on the facts adduced at this hearing a violation should be found, but if not, such evidence constitutes evidence of the Respondent's animus toward Lee.

E. The Union

Mr. and Mrs. Kong were out of the United States during May and June and returned in mid-July. Their son Kevin joined them in China in the first half of July.

Liu testified that in July, 2005, he discussed with Lee a DOL notice posted in the restaurant which set forth the legal minimum wage and overtime rates. Lee told him that the wait staff was not earning the legal minimum wage and that they should try to be compensated for their lost wages. Liu stated that captain Evelyn overheard them and asked if they were trying to "overthrow" the restaurant, noting that she did not believe that they would remain employed by the Respondent if they were not receiving the proper pay. Lee answered "yes" and walked away. Evelyn then told Liu that she would wait for Susan Kong to return to determine whether Lee would be discharged. Evelyn did not testify.

In mid July, 2005, Liu and Lee were told by employee Yu Chuan Chu that the previous day he went to the Union and learned that he should be protesting many aspects of his work. Chu suggested that they visit the Union together. On about July 14 or 15, Liu and Lee visited the Union and presented their paystubs and a warning letter that Lee had received for refusing to pay an unpaid customer check.¹⁰ The Union agent said that the paystubs improperly omitted

¹⁰ The only authorization card received in evidence was one signed by Lee and dated
Continued

the number of hours worked and the hourly rate.¹¹ The following day, Liu and Lee told their co-workers what they were told by the Union agent, and what steps they should take to correct what they considered the Respondent's improper actions.

5 Liu stated that he told captain James that he visited the Union with Lee and learned that the information on the paystubs were wrong. James used the Respondent's computer to calculate how many hours they worked and how much pay they received and agreed with Liu that "there was a big different" [sic]. On about July 20, at least eight employees, including Lee, Ping Yuan Wu, Yu Zhen Wang and Yu Chuan Chu visited the Union. Eleven days later Lee was discharged.

10 The Respondent argues that Liu's testimony that he told James that he and Lee visited the Union is not credible because Liu had no reason to volunteer that information to someone he believed was associated with management. In making this argument, the Respondent overlooks Liu's detailed testimony that he and Lee brought their paystubs to the Union and were told that the stubs improperly omitted certain information and then sought to verify with James their suspicions that they were not being paid properly. James then accessed the Respondent's computer, and agreed with them that there was a difference between the hours they worked and the amount they were paid. Accordingly, Liu testified to precise reasons why he told James they visited the Union. The employees' belief that they were underpaid and then advising James of their belief is supported by the fact that they later brought a lawsuit against the Respondent alleging such underpayment.

F. The Employees' Request That They be Permitted to Take Food from the Buffet Tables

25 Liu testified that when the wait staff and busgirls ate their meals, they were not permitted to take food from the buffet tables used by the customers. Rather, the kitchen prepared two dishes which they ate. Liu noted, however, that other workers, including the kitchen employees and cooks, busboys, the hostess, cashier and captains took food from the buffet.

30 Liu stated that on about July 19, he and his co-workers including Lee were eating their meal together when Susan Kong walked past them. The co-workers agreed that Lee would speak in their behalf. Also present were Kan Pat Kong and Evelyn. Lee testified that he asked Mrs. Kong that the wait staff and busgirls be permitted to take food from the buffet for their dinner. She replied that they could only take such food when customers were no longer in the restaurant when it was about to close. Lee replied that the employees would not have enough time to eat at that time because customers did not leave until 9:30 p.m., and the workers had much work to do before the restaurant closed at 10:00 p.m. He noted that the managers, captains, busboys, cashiers and part of the kitchen staff were permitted to take food from the buffet at any time. Liu quoted Lee as telling Mrs. Kong that management did not respect them as "human beings." Mrs. Kong then asked chef Tak who was also at the meeting to cook different types of food if the wait staff requested it so they would not get bored with what was given to them. Liu stated that Susan Kong said that the wait staff could follow these rules or eat

45 August 3, three days after his discharge.

50 ¹¹ Liu's pre-trial affidavit makes no mention of a July, 2005 union meeting but his testimony is corroborated by Lee who stated that he went to the Union with Liu. In this regard Lee's testimony was somewhat confused about the dates he visited the Union and with whom he went, but his testimony was credible in that he visited the Union on two separate occasions and was corroborated by Liu.

at home, adding that beginning the following day, the wait staff dinner time would be 9:15 p.m. instead of 9:00.

Lee noticed Evelyn standing behind him when he spoke and noticed that a co-worker gestured to him that she was pointing at his head.¹² Liu stated that Evelyn stood behind Lee and pointed her finger at his head, saying softly that he (Lee) was a “shit stirring stick” which in the Chinese dialect means that he is a “troublemaker.”

Ping Yuan Wu testified that after the meeting Susan Kong drove her home during which Mrs. Kong told her that the three busgirls including her were good workers, but that Lee was old and it would not be easy for him to obtain employment outside the restaurant¹³ – adding “how come he’s still stir up so much trouble in our restaurant, and complaining about the food, and not taste good, things like that?” [sic]

Susan Kong testified that she initiated the meeting while the employees were dining by asking them how they liked the food. She stated that she inquires of her employees more than once per month whether they liked the food because it was important that they are happy, which she believed would cause them to serve the customers in a pleasant way. Accordingly, she was “very happy” when they complained about the food that was available for them. Notwithstanding that Mrs. Kong stated that she welcomed such complaints, as set forth above Wu stated that during the ride home that night she criticized Lee for complaining about the food and causing trouble in the restaurant.

Mrs. Kong admitted that Lee and other employees complained that evening that they were tiring of the food the kitchen made for them, and asked why they could not eat from the buffet. She replied that they could eat from the buffet after 9:30 p.m. on weekdays, adding that they could also leave the restaurant to have their meals. That hour was selected because by that time most customers no longer took food from the buffet. She ordered chef Tak to make the food that the workers requested. Mrs. Kong did not recall whether anyone pointed to Lee’s head or called him an obscene name.

It should be noted, as set forth above, the employees who attended this meeting visited the Union the next day, July 20.

G. The Discharge of Lee

1. The Events of Sunday, July 31

David Lee was employed as a waiter from March, 2004 to July 31, 2005.

Lee stated that on July 31 he was the only waiter assigned to his section whereas usually two waiters work in that area. At about 9:45 p.m. there were no customers in his section and he prepared to have his dinner. As he obtained a dish he heard a plate drop and break. He turned to see where the noise came from but did not see anything. In fact, a girl about 5 years old dropped a plate at the buffet table. Lee then “rushed” to clean his plate and “rushed” to eat. He encountered Susan Kong who said that “something was broken, why didn’t you take care of it?” Lee answered “where?” Mrs. Kong pointed to the area. Lee replied that someone was already cleaning it up, and anyway he had to “rush” to eat his meal, adding that he was the last

¹² Lee’s pre-trial affidavit makes no mention of Evelyn’s gesture.

¹³ Lee was 58 years old at the time.

worker to eat that night. He then went to eat his meal. Busgirl Zhang immediately picked up the plate and cleaned the area.

At hearing, Lee gave various reasons for not attending to the matter: (a) although he
5 heard a plate break he did not see anything and had no idea "what was going on" (b) the broken
plate was not in the direction he was going to obtain food for his meal (c) he had to have his
meal and (d) it was not his job to clean a broken plate.

Susan Kong testified that she was seated, dining with her friend Melissa Chiu when she
10 heard a plate break. She stood and noticed that the noise came from the ice cream machine
area, and at the same time noticed a girl standing there who appeared frightened. Mrs. Kong
turned around and saw Lee taking a plate from the buffet area. That evening, Lee was assigned
to the "a,b,c" section which was one or two aisles away from where the plate dropped. Mrs.
Kong did not see any other employees at that time. She then saw Lee look at the girl, and Mrs.
15 Kong then sat down, believing that Lee would attend to the situation. After two or three seconds
elapsed, Mrs. Kong saw Lee look away from the girl. Mrs. Kong stood, saw Lee leave the area,
and she went to the girl. When Mrs. Kong arrived in the area she saw the girl attempt to pick up
the broken plate. She told her not to touch it and the girl left the area. Mrs. Kong raised and
waved her hand, a gesture meaning that she needed help.

20 Busgirl Ping Zhang¹⁴ had just finished her dinner and was walking near that area. She
immediately picked up the plate and cleaned its contents from the floor. She saw no one next to
the plate. She stated that she picked up the plate without being asked to do so because she
was responsible for that area. She did so quickly because she was anxious to go home. She did
25 not notice whether any busboys were in the area.

Mrs. Kong testified that she approached Lee who was returning from washing his plate,
and asked him why he did not help the girl. At that time, Zhang was still cleaning the plate. Lee
replied that "someone will do it." Mrs. Kong answered that there was no one there at that time.
30 In this respect her testimony is suspect since she later testified that someone was cleaning the
plate before she approached Lee. Lee responded that he had to eat his dinner before all the
food was gone. Mrs. Kong returned to her seat, resumed her dinner and Lee went to the party
room to eat his meal. Melissa Chiu, a friend of Mrs. Kong who dined with her that night and who
followed Mrs. Kong to the scene of the broken plate because she was "nosy" corroborated Mrs.
35 Kong's testimony regarding her warning to the girl and her conversation with Lee. Curiously,
Chiu denied that the plate was being cleaned while Mrs. Kong spoke with Lee although Mrs.
Kong said the plate was being cleaned at that time.

Chiu testified that the conversation between Lee and Mrs. Kong took place in the
40 Mandarin dialect. Mrs. Kong stated that Lee spoke in Cantonese, and that she spoke in either
Mandarin, Cantonese or both. Other employees stated that they both spoke in Cantonese.

Within the next thirty minutes, Mrs. Kong thought about the incident and concluded that
Lee's actions were irresponsible. She was concerned about the girl's safety in attempting to pick
45 up the plate and was offended by Lee's attitude in ignoring that patron, telling Mrs. Kong that
someone would take care of it and that he had to eat, and not accepting responsibility for his
wrongdoing. She conceded that ordinarily two waiters are assigned to the "a,b,c" section on a

50 ¹⁴ Ping Zhang was sometimes referred to as Ping Chang or Ping Zang. Hereafter, she will
be referred to as Ping Zhang, the name she gave when she testified and the name in which an
offer of reinstatement was made.

Sunday night and did not know why Lee did not take his break earlier, but only saw him in the area and thus blamed him for not going to the girl's aid. She emphasized that she did not expect Lee to pick up the plate or clean the floor, but to stand by the girl and call someone to clean the area. Mrs. Kong stated that a waiter's first responsibility is to serve the customer and ensure her safety.

Mrs. Kong stated that in deciding whether to fire Lee, she considered the fact that she had previously orally warned Lee about customer complaints, and that he had prior written warnings.¹⁵ In this regard, Mrs. Kong testified that prior to March, 2005, she received a number of complaints from customers about Lee's service. For example, she received more than two complaints that Lee spoke with customers he liked and ignored other customers, disregarding their requests for more beverages. She also received two or more additional complaints that if the customer left a poor tip or no tip, Lee would not provide good service when they returned to the restaurant.¹⁶ Mrs. Kong orally reprimanded Lee for such complaints. His excuse was that he was busy. She did not make a written record of the complaints or her reprimands, but she stated that she told two or three employees, without naming Lee, that she did not want such practices to continue. She did not recall who she spoke to.

Kevin Kong also testified that he received more than five customer complaints about Lee's service which constituted slightly more complaints about him than he received concerning the service of other waiters. Such complaints included that he was absent when the customer was ready to pay his bill. Kong stated that he orally warned Lee at least once when he received a complaint but did not make a written record of any of those oral warnings. Kong also stated that Lee had trouble reading customer bills but that did not result in any unpaid bills or bills delivered to the wrong table. Lee testified that he was never told that customers complained about his service, and he does not believe that he was orally warned about any customer complaints.

Shortly after the incident on July 31, Mrs. Kong told Kevin Kong what happened and said she wanted to terminate Lee, and also told captain James to advise Lee that he was discharged.¹⁷ James told Lee that Mrs. Kong said that he could finish his meal and not return to work the next day. Li Feng Liu stated that he was eating with Lee at that time and heard James tell him that Mrs. Kong said that Lee did not help clean the broken plate and he was fired. Lee then asked Mrs. Kong why she fired him. She said that something was broken and he was irresponsible in not attending to it. Lee replied that he had to rush to have his meal and someone was already cleaning it up.

Employee Liu heard the plate drop. He took a brief look and saw the girl, who appeared to be frightened, stand there "a very short moment. After the plate was dropped on the ground and it seems she quickly walk away." The implication of his testimony was that he did not see her attempting to pick up the plate before she left the area, and he did not see Mrs. Kong approach or speak to her. Liu saw the girl drop the plate, stand at the scene a moment and then leave. This is supported by Mrs. Kong's testimony that when she heard the plate break she

¹⁵ The fact that Mrs. Kong's pre-trial affidavit did not mention that customer complaints were a reason for firing him does not contradict her testimony that she considered them in making the decision to terminate him.

¹⁶ The tips are shared by the wait staff, busboys, busgirls, host and captains.

¹⁷ The testimony of Mrs. Kong and Kevin Kong were somewhat contradictory on this point. Mrs. Kong stated that she told her son that she wanted to fire Lee, but Kevin stated that she told him that she had already discharged him.

stood up, looked, and then sat down. She then got up and walked over to the area. Clearly, in that period of time, if Liu is credited, the girl would have left the area before Mrs. Kong arrived at the scene.

5 Liu stated that he pretended not to have seen the incident but believed that Susan Kong saw him as he was walking in her direction. He proceeded to the kitchen to obtain some food for his meal. He believed that the matter was not his responsibility since cleaning a dropped plate was the responsibility of the busboy (and in fact he saw two busboys in the area at that time, but
10 no other waiters other than Lee) or the cleaning person, and anyway he was late for his meal, which was usually at 9:00 p.m.¹⁸The Respondent argues that his testimony about the presence of the busboys is not credible since Liu also stated that generally the busboys leave the dining room at 9:30 p.m. to change their clothes and prepare to leave the restaurant. He explained, however, that after changing they resume their service in the dining room awaiting the "last call" which is the final opportunity for customers to obtain food from the buffet.

15 On his way out of the kitchen Liu overheard Susan Kong ask Lee in a "very loud and very rude" voice why he did not clean up the area with the broken plate to which Lee responded that it was not his job and he was on his way to have his dinner. At that moment, Liu saw a
20 busgirl cleaning up the broken plate. Liu denied seeing Melissa Chu standing behind Mrs. Kong when Mrs. Kong spoke to Lee.

 Ping Yuan Wu testified that when she heard the plate drop she saw Lee on his way to wash his plate. She did not stop what she was doing which was cleaning the salad bar. She
25 heard Susan Kong say "David, the plate just dropped right there, how come you didn't come to clean it up?" Lee replied that he was not in the immediate area and only heard the noise and had to eat his dinner. During that conversation, Wu noticed that busgirl Zhang was cleaning up the broken plate.

 Thus all of the General Counsel's witnesses testified that Mrs. Kong criticized Lee for not
30 cleaning the broken plate and did not mention his alleged failure to protect the customer from harm. Lee said that when he asked Mrs. Kong why he was fired she only mentioned the fact that he did not clean up the broken plate. No mention was made of the child.

 An incident report written by Kevin Kong and dated July 31 stated the following:

35 A customer (who appeared to be 5 or 6 years old) dropped and shattered a plate in David's section of charge. Rather than protect the customer from the broken plate, David simply looked and walked away. When asked why he did not help the customer,
40 David replied that someone else would have helped the customer. When it was pointed out to him that nobody else was around to see the incident, David said that should he stay and help the customer, there may not have been enough food left for him for his dinner meal.

45 Due to his lack of responsibility and concern for the customer, and a record of prior incidences, David was terminated from his position.

50 ¹⁸ His pre-trial affidavit states that there were a "few other waiters in that area." By that he meant that there were other waiters in the restaurant but not where the plate was dropped.

Mrs. Kong testified that at the time she decided to discharge Lee she had no knowledge that he engaged in any activities in behalf of the Union and she had not formed an opinion as to whether any employee had complained to the DOL.

5 Mrs. Kong testified that she terminated more than ten employees from the time the restaurant opened in 1998 to July 31, 2005. The reasons for such discharges included laziness, stealing tips, and being impolite to customers. Kevin Kong testified that he has fired workers before and after Lee was discharged because they were not skilled enough to do the work, and because they were not working effectively. However, he could not recall a specific instance of
10 such a discharge. Significantly, no explanation was given for the failure to discharge Lee for similar instances of misconduct prior to July 31.

Kevin Kong testified that at the time of Lee's discharge he was not aware that any employees had engaged in any union activity, nor was he aware that Lee had signed a card for
15 the Union or whether any employees met with the Union.

At hearing, Lee conceded that a patron could be hurt if a broken plate remained on the floor. However, since he did not see it and did not know what happened he did not investigate to see what the problem was. He stated that customers frequently drop plates in the restaurant,
20 but it is the responsibility of the busboys or the cleaning person to pick up the plate and clean the area. On July 31, he did not do so because two busboys were in the immediate area, he was late for dinner and thereafter had to finish his work and go home. He testified that he does not have to ask a busboy to do such work because he knows his job, and that if he is the only person in the area he would report the spill and ask a busboy to clean the area. Yu Chuan Chu
25 testified that although a broken plate may cause a dangerous condition it was not the wait staff's responsibility to make sure that the area was cleaned or the dangerous condition rectified. Chu added that he would not pick up anything from the floor or clean the floor because of concern that his hands would be in contact with contaminated items and he would then have to serve customers. He stated that such a matter was the job of the busboys and the cleaning person.
30 However, he conceded that if he saw a broken plate he would bring it to the attention of someone who could attend to it.

Kevin Kong stated that it is the waiter's job to make sure his assigned area was clean by picking up food debris or spills on the floor or at their tables or adjacent to the tables they are
35 assigned. He noted that the waiters have the authority to ask a busboy or the cleaning person to help them. Kong added that he did not expect the waiter to do heavy cleaning or scrubbing, but did expect him to pick up dropped food. After doing so the waiter is expected to clean his hands. Kong has instructed waiters to clean the area to which they were assigned before and after the Union petition was filed on August 4, 2005.

40

2. The Meeting

Immediately after Lee's discharge Mrs. Kong asked James to assemble all the workers for a meeting. Liu said that Kan Pat Kong was also there. Mrs. Kong stated that her purpose in
45 meeting was to explain why she fired Lee so that the mistake he made would not be repeated. Lee was present for only the first part of the meeting which continued for about 1½ hours.

Such a meeting was unprecedented in that no employee meeting was held when any of the ten or more workers were terminated prior to July 31 for laziness, stealing or impoliteness
50 because, as stated by Mrs. Kong, it was obvious that workers cannot engage in such conduct. Mrs. Kong stated that she held the meeting upon Lee's discharge because she wanted to emphasize the waiters' responsibility for customer safety, impressing upon them that they

should not leave broken plates on the floor and that she did not want this to occur again. Another reason for her holding the meeting was that she heard employees speaking among themselves, angrily opposing her decision to fire Lee. In the past no one questioned her decision to fire a worker and the fact that her employees were upset regarding Lee's termination played a "big role" in her decision to have the meeting and explain why she fired Lee and in consideration for her employees' feelings on the matter.

Mrs. Kong testified that she told the workers that Lee saw the child who broke the plate but was not willing to help her. She explained that she did not expect him to clean up the plate, just to stand with the customer to protect her and prevent her from touching the broken plate. She accused Lee of irresponsibility in ignoring the situation and saying that it was not his job. Kevin Kong quoted his mother as saying that the waiter's highest priority is the safety of the customers, and that instead of helping the girl he walked away and went to get his dinner.

A number of the employees argued that Lee was a good worker who assisted his customers, and that his discharge was unfair and that he should be reinstated. Mrs. Kong testified however, that some employees said that he was "unlucky" because Mrs. Kong saw him ignoring the girl.¹⁹ Susan Kong insisted that he was irresponsible, and that he had already received two warning letters – one for refusing to pay an unpaid bill, and therefore she could no longer keep him in the Respondent's employ. Chu said that it was not fair to fire him for such a "minor incident" and that Lee would sue the Respondent. Susan Kong said he could sue her if he wanted.

Liu testified that Mrs. Kong asked that Lee return the following day to explain to her what happened. Mrs. Kong, however, testified that since her main purpose in meeting was to emphasize that such misconduct should not happen again and because some employees said that Lee was a good worker, she told those assembled that if Lee apologized for his conduct and promised not to repeat it, she would consider reinstating him. At hearing, Mrs. Kong stated that she told the employees to tell Lee to call her. Kevin Kong stated that his mother said that she would consider reinstating Lee if he came to her and apologized for his actions. Liu stated that at the end of the meeting, Susan Kong agreed to have Lee return the following day to explain to her what had happened, and then return to work. He did not hear Mrs. Kong say that Lee had to call her, and did not recall her require that Lee apologize.

The testimony of Mrs. Kong and her son are contradicted by James' actions in telling Lee later that night that he spoke to Mrs. Kong and she directed that Lee not return to work. Even if Mrs. Kong expressed a wish that Lee speak to her the following day, such an alleged desire was not sincere since captain James told Lee later that night that Mrs. Kong did not want him to return to work.

Lee testified that at the meeting he told Mrs. Kong that if he actually saw the broken plate he would attend to it, but since he did not know what happened on the other side of the buffet he did not. Lee quoted Jenny as telling Mrs. Kong that he always attends to the needs of the patrons. Lee left the meeting before it ended, and was called later that night by his co-workers and told that he could return to work the next day. However, Lee later testified that after he left the meeting he remained in the parking lot and was told by his fellow employees that Mrs. Kong expected him to contact her the following day.

¹⁹ Li Feng Liu denied hearing any employee say that Lee was unlucky by being observed by Mrs. Kong ignoring the girl.

Later however, captain James called Lee at home and told him that he had spoken to Mrs. Kong, and Lee could not return to work. Lee protested that his co-workers told him that he was supposed to meet with Mrs. Kong the following day. James called later and said he spoke to Mrs. Kong who said that he could not return to work the next day. Lee replied that Liu said that Mrs. Kong agreed that Lee could meet with her the following day and explain what happened.

3. The Events of August 1

Lee returned to the restaurant the following morning, August 1. Kevin Kong told him that he need not have come back to work since his mother fired him the previous evening. Lee asked for a letter of discharge and was told that, on advice of counsel, a letter need not be given.

Lee later testified that Kong refused to permit him to work, telling him that "you claim your brothers and sisters told you to come back to work. In fact, this restaurant doesn't belong to your brothers and sisters..." From the parking lot Lee phoned the restaurant, telling James that he was told by Liu that at the meeting the prior night it was agreed that he could return to work, but he was not permitted to do so. Accordingly, he told James that he wanted to speak to Mrs. Kong. James gave Lee her phone number. Lee stated that he called Mrs. Kong at 11:30 a.m. and left a message with his name and phone number. No one returned his message. Lee called four or five times thereafter, each time leaving a message but he received no return call.

Lee's co-workers Bi Chen, Lin, and Liu arrived at work that morning and told Kevin Kong that Mrs. Kong said she would reinstate Lee, and they said they would protest the denial of his reinstatement saying that they feared that they could also be discharged at any time without an explanation. They protested by sitting down first in the dining room, and then leaving and sitting down outside the restaurant in the parking lot. Liu testified that Kevin told them that if they did not return to work immediately they would be fired. Lee first testified that Kong told them that if they did not return to work immediately they were fired, but then testified that he said that if they did not return he would consider that they quit. Lee added that the workers then said that they are not refusing to work "just sitting down to demand an answer." Shortly thereafter, Kevin Kong, accompanied by the cook, asked them if they wanted to work. They decided to return to work and walked inside at about 11:40 a.m.

Kevin Kong testified that he saw Lee arrive at 11:00 a.m. with waiters Chu, Liu and Bi Chen. He asked Lee why he was there, but testified that he thought that Lee came to apologize. However, Lee replied that the "brotherhood" told him to return to work, according to Kong, "as if he owns the place." Kong responded that his mother did not tell him to return to work. In this connection, it is odd that Kevin asked Lee why he was present since he testified that his mother said the previous evening that she would consider reinstating him if he came to her and apologized.

Kevin further stated that the other waiters told him that if he did not reinstate Lee they would quit. Kong said that if they quit he would be unable to do anything about it, denying that he threatened them with discharge if they did not return to work. That testimony is corroborated by Lee, set forth above. They all left the restaurant and went into the parking lot. Kong went outside and asked what they wanted. They said they wanted Lee reinstated. Kong said that his mother did not say that she would reinstate Lee and he could not overrule that decision. The waiters other than Lee then returned to work at about 11:30 a.m.

Mrs. Kong testified that Kevin told her that Lee came to the restaurant and said that his “brotherhood” told him to return to work. Mrs. Kong told Kevin that she told his co-workers that he “had to call me” to apologize and she would then reinstate him, and if he did not she would not reinstate him. She did not consider Lee’s statement that his “brotherhood” told him to return as an apology, and refused to reinstate him. I note, however, that even before Lee’s return to the restaurant the next day he was told by captain James that Mrs. Kong did not want him to come back to work. In addition, upon his arrival, Kevin Kong told Lee that his mother did not want to reinstate him. Accordingly, I cannot credit Mrs. Kong’s testimony that Lee’s apology would have caused Mrs. Kong to reinstate him.

H. The Letter of Protest and the Events of August 2 and 3

The workers prepared a “letter of protest” which Liu and Chu presented to Kevin Kong and captain James on August 2. James translated the letter for Kevin Kong who said that he would call his mother.

The letter said, essentially, that all the waiters protested the firing of Lee, adding that they were also protesting the Respondent’s “unreasonable, unfair and unlawful” practice of requiring them to pay bills unpaid by customers. The letter noted that three months before, Lee protested this practice “for all of us” and that the Respondent at that time began a “series of warning measures and procedures” pursuant to which he was picked on and suffered “retaliation” until his discharge. According to the letter, such discipline included warning letters given to Lee on April 20 and in July because his customers failed to pay their bills. The letter noted that “under the leadership of David Lee the entire wait staff met with Susan Kong to ask” that they be permitted to take their meals from the buffet, which it termed the “most basic benefit for us.” Finally, the letter stated the workers’ belief that Lee was discharged for “fighting” for the security of the workers, and not because of the “so-called reason” that he did not attend to the girl who dropped the plate. The letter concluded that the workers do not feel secure and have no job security. It was signed by employees including Yu Zhen Wang, Liu, Jenny, Bi Chen, Lee, Yu Chuan Chu, Ping Zhang, Hui Ma, Liu, and busboys Eloy Hernandez and Raul.²⁰

Mrs. Kong conceded that after receiving the letter she initiated and held separate, private conversations with her workers that day and the next day. She testified that she spoke to her workers, first to explain why she fired Lee, and then to ask them whether she should reinstate him. At hearing, she stated that she had been on vacation from late May to July 10 and was therefore was not familiar with the restaurant’s operation or Lee’s performance during that time. She therefore wanted to learn what was happening in the restaurant during her absence and if anything was “wrong.” Mrs. Kong stated that this was the first time she received a protest letter following the discharge of a worker. She believed that perhaps she did something wrong and wanted to find out more about it.

She asked her employees if she should reinstate Lee. She first stated that in the past she asked her employees what they would do if they were her, but later denied asking them that question. According to Mrs. Kong, all the employees except Wang, Ping Yuan Wu and Chu said that she was justified in firing Lee. Those three workers said that he should be reinstated. Liu expressed his fear that he and other workers would be fired because of the “way you fired David Lee.” Mrs. Kong attempted to reassure him by saying that as long as the workers did their jobs well they would not be fired without cause.

²⁰ Li Feng Liu adequately explained that he told the Spanish speaking busboys in English what the letter said and asked them to sign.

Mrs. Kong asked the workers during their meetings whether Lee was performing his job well when she was away. She quoted Ping Zhang as saying that occasionally he was lazy and that she would not reinstate him. Zhang denied making those comments to her.²¹

5

The employees' versions of those meetings follow:

10 Liu testified that Susan Kong asked him who wrote the letter of protest. Liu answered that the identity of the person who wrote it "does not matter as long as the letter is factual." Kan Pat Kong who was at the meeting told Liu that when captain Raymond left the restaurant he intended to promote Liu to his position but instead promoted Evelyn because she had been employed longer. Liu directed the conversation back to the letter and said that these are our "ground rules" – the Respondent should not have fired Lee for such a "minor" reason. Liu argued that Lee was not irresponsible and had been employed by the Respondent for more than one year and no one complained that he was irresponsible. He cited a case involving Evelyn's alleged irresponsibility. Liu told Susan Kong that Lee's firing made the workers feel "very insecure" because if Lee could be fired for that reason they feared that they would be similarly treated.

20 Ping Yuan Wu testified that on August 2, Mrs. Kong said that she had heard from Kevin that Wu signed the protest letter. Wu admitting signing the letter. Kong asked that they speak as friends and asked for her opinion of the decision to fire Lee. Wu answered that the decision was wrong since the patron dropped the plate and Lee was not nearby. She cited an instance where Lee helped a child who burned his hands, and said that his customers liked him. Kong replied that Lee was old, someone accused him of stealing tips and captain Raymond had once suggested that she fire him but she "still gave him a chance" but now regretted not discharging him earlier. Wu called Kong's complaints about Lee "minor" and asked that he be reinstated.

30 Wu further testified that she asked Mrs. Kong whether she asked Lee to return to work the previous day, and Mrs. Kong replied that Lee told James that his brothers and sisters wanted him to return to work "and because of that... I just don't want him to come back." Kong then said that she did not want Lee to return to work "because once he's back, there would be more troubles," adding that since her son Kevin was an adult he could easily obtain employment elsewhere and she could "just close down this business." She also said that even if she had to close the restaurant she would not allow Lee to return to work.

40 Zhang was asked by Mrs. Kong why she signed the protest letter. Zhang replied that she signed in order to protest the discharge of Lee. Mrs. Kong told her that Raymond wanted to fire Lee prior to this incident but she did not because Lee was old and she believed that she would just keep him employed. Susan Kong asked what she thought of Lee as a worker and Zhang responded that employees are sometimes good and sometimes make mistakes. Zhang testified that Mrs. Kong also told her that Lee "stirred up" many things including complaining about meals for the staff and by addressing the boss at that time.

45 On August 3, Lee and Yu Chuan Chu signed cards applying for membership in the

50 ²¹ Mrs. Kong conceded that it was "odd" that Zhang would say negative things about Lee yet sign a letter asking that he be reinstated. I cannot credit Mrs. Kong's testimony that Zhang told her that she did not know that Lee was discharged when Zhang signed the letter asking for his reinstatement since it is obvious that in requesting his reinstatement she must have known that he was terminated.

Union. That day, Mrs. Kong asked Chu if he signed the letter of protest and whether anyone forced him to sign. He admitted signing it but denied that anyone forced him to do so. She said that she wanted to find out who forced employees to sign the letter. She asked why he signed it and Chu explained that Lee was discharged without cause.²² Kong then asked what he would do if he were she. Chu said that he would reinstate Lee. Kong replied that Lee was “irresponsible.”

I. The Events of August 4 through August 8

On August 4, the Union filed a petition for representation seeking a unit of dining room employees, wait staff and buspersons. That day, Yu Chuan Chu gave a copy of the Union’s petition to captain James.²³ James called Kevin Kong and told him that a union petition was faxed to the restaurant. Kevin informed Mrs. Kong who was with him at the time. Mrs. Kong instructed that it be faxed to their attorney. Kevin testified that he and his mother spoke about why he believed that the waiters wanted union representation, but they did not try to identify which workers they thought sought the union’s representation.

During the lunch hour, a meeting was held with waiters Liu, Chu, Wang, Jenny, Liu, Bi Chen, Lin, Ma, and owners Susan Kong and her husband. Kevin Kong testified that he also attended the meeting, and stated that he began the meeting by asking Liu “why are you guys doing this?” He asked Liu that question because he believed that he was one of the employees who “wanted to ... start a union.” However, Kevin Kong later testified that he did not know or suspect who was responsible for the Union’s petition. Kevin Kong further stated that before receiving the petition on August 5, he was not aware that any employees had contacted a union or had engaged in activities in behalf of a union.

Liu testified that Mrs. Kong asked the same question – why did they join the Union. Liu replied that they wanted to protect their jobs and to obtain Lee’s reinstatement. Kevin replied that the restaurant would not fire them and asked why they were frightened. Liu answered that they wanted to make sure that their jobs are protected and to have Lee return to work. According to Kevin, his mother said that she would rather close the restaurant than reinstate someone as irresponsible as Lee. Kevin denied hearing any other reference by Mrs. Kong to closing the restaurant.

Liu testified that Susan Kong told them, “you guys were planning to organize a union. We will absolutely disagree for you guys to do that.” Chu asked what was wrong with a union, adding that unions are “everywhere” in the United States and the restaurant could continue to operate with a union. Kan Pat Kong answered that he had consulted his attorney, and “if you guys have a union, then we will have to handle everything according to the law” – “in the future we have to report to the tax for every penny you made and you guys would be required to have legal status.” Mr. Kong then told Wang that she would have to provide a social security card. Susan Kong added that “we’d then have to have many new rules regarding the work in the restaurant.” Liu stated that either Mr. or Mrs. Kong then said that the “worst case would be just let us close down the business.” Mr. Kong did not testify.

Yu Chuan Chu testified that Susan Kong opened the meeting by saying that she

²² Pursuant to the General Counsel’s unopposed motion, page 370, line 6 is corrected to state that Mrs. Kong “fired” Lee.

²³ Chu testified that he gave James the petition on August 1 which could not be correct since it was filed on August 4.

received a Union letter, asking "why did you join the Union?" The employees answered that they joined because of the way in which she fired Lee and in order to obtain job protection. Mrs. Kong told them that she "would not allow us to create a union or supporting a union." [sic] Mr. Kong said that if they join the Union he would have to obtain immigration documentation of the workers and those who did not possess such papers would be fired. Mrs. Kong said that if they joined the Union she "was going to have to close the restaurant." Mrs. Kong then asked if she reinstated Lee "what else do you want?" They replied that they just wanted Lee to be rehired. Mrs. Kong said that they would meet later.

Mrs. Kong testified that prior to the company's receipt of the petition on August 5, she was not aware that the employees sought to join a union, nor did she know which workers supported the union. She described the meeting that afternoon. It began with Kevin Kong speaking to Liu. She joined the conversation and soon more employees participated in the discussion at their lunch break. The main point was the demand for Lee's reinstatement, with some employees saying that if he was not reinstated she will be sued and get in trouble. Mrs. Kong accused those workers of threatening her and stated that she would rather close the restaurant than rehire Lee because it would be "totally destroyed." Mrs. Kong denied that there was any mention of the Union because she did not want to speak about that subject. She also denied that the workers told her that one reason they wanted a union was to obtain Lee's reinstatement.

Susan Kong denied hearing Kevin or her husband ask the workers if they joined the Union. She denied saying that joining the Union would be futile or would not help them. She further denied threatening the workers that if they joined the Union she would have to examine their documentation, or that she would close the restaurant if they became union members. Mrs. Kong also denied asking Wang or Ping Yuan Wu any questions concerning the Union or whether they supported the Union. I cannot credit this last denial concerning Ping Yuan Wu because Mrs. Kong conceded asking Wu if anything was wrong with her because many of her workers wanted to join a union.

Kevin Kong similarly denied saying and did not hear his mother say that it would be futile to join the union. He also denied that any management official said that the Respondent would have to obtain documentation of legal immigration status if the Union was successful in organizing it.

Mrs. Kong conceded calling several employees, including Ping Yuan Wu, Chang Ping and Wang into her basement office where she held individual meetings with them. Mrs. Kong explained that since she was absent from the restaurant for two months she tried to learn if there was something wrong or whether something happened while she was away. Wu told her that everything was all right. She asked Wu what she thought of her (Mrs. Kong) "because since the petition, that lot of people want to join a union, I was wondering, is maybe something wrong with me?" She also asked Wu if there was anything wrong in the restaurant. Wu replied that nothing was wrong.

Yu Zhen Wang testified that she was asked to report to Susan Kong's office where they met alone. Kong asked her if she signed the protest letter and if so why she signed. Wang answered that she signed the letter so that Lee would be reinstated. Mrs. Kong asked her what Lee was like "as a person" and Wang answered that many customers liked his service. Mrs. Kong then asked Wang if she joined the Union and Wang denied doing so. Mrs. Kong then said that if Wang joined the Union she would have to treat her "according to all the rules and regulations" including requiring that she present a social security number, but adding that if she did not have one she could have someone obtain a number for her. Mrs. Kong advised her to go

home and “think through” what she told her.

Busgirl Ping Yuan Wu testified that on August 4, Susan Kong spoke to her in her office, asking “did you join the union also?” Wu denied joining the union. Kong asked her what the
 5 benefits of union membership were. Wu replied that in China union members who were sick were paid by the union. Kong answered that she “don’t [sic] like you guys to join the union.” Mrs. Kong then said that she wanted to assign her to work at the salad bar. Wu, who had the most experience at the salad bar, told her that she did not want to work there because her health did not permit her to walk up and down the stairs to the basement where the food was prepared and
 10 bring it to the salad bar on the dining room floor. She also said that she did not get along with the two chefs in the basement. She remained in her position which was at the hot bar. Mrs. Kong stated that for a long time, even before the petition was filed, none of the busgirls wanted to work as the main salad bar assistant. Wu further testified that Mrs. Kong told her that her past practice of paying taxes for Wu would cease since she joined the Union, and henceforth she
 15 would have to pay her own taxes.²⁴

Wang testified that on August 8, Susan Kong told her that her lawyer or the DOL required her to supply the social security numbers of her workers and that therefore she was asking Wang for that document. Wang replied that she does not yet have it and does not know
 20 where she can obtain it. Kong told her to borrow it from the “amigos,” an apparent reference to the Hispanic busboys, adding that it could be a “fake social security card” – “as long as you show it to me it would be fine.” Kong then asked her if she joined the Union. Wang denied doing so, and Kong told her that joining the Union would not be good for her since she is not documented, and Mrs. Kong would have to “process everything according to the rules.” Wang
 25 replied that in China “everyone” was a member of a union which helped them obtain benefits and welfare. Kong answered that if she did not join the Union she (Kong) would “no longer need to process everything strictly according to the rules and then that means I can just work as usual.”

Mrs. Kong testified that although she received legal advice from March to August, 2005 that immigration forms should be obtained from her employees, she nevertheless did not begin requesting such documentation until August, 2005. She stated that on August 5, 2005 she asked her employees for documentation of their immigration status, and beginning at that time she began examining more closely the documentation of her employees to determine whether
 30 they were lawfully permitted to work in the United States. She conceded asking Wang on two separate occasions for documentation, and that Wang replied that she had not obtained such papers but would get them as soon as possible. Mrs. Kong denied asking Wang if she joined or supported the Union, and did not threaten her with more closely examining her documentation if the Union organized the employees.
 35

The above indicates that although Mrs. Kong was advised to check immigration documents as early as March, she did not do so until August, following Lee’s discharge, her receipt of the employees’ protest letter and the Union’s petition.
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J. Changes in Treatment of the Wait Staff

1. Congregating with Each Other

²⁴ Wu’s pre-trial affidavit did not mention Mrs. Kong’s alleged comment about the payment of taxes although she said she told the Board agent about it.
 50

Busgirl Yu Zhen Wang testified that in about mid August, she stood and spoke with co-workers Ping Yuan Wu and John Ping at the buffet tables where they were assigned. She noted that when she engaged in such conduct there were few or no customers to be served. Susan Kong approached and told them that "from now on you are no longer supposed to stand
 5 together or to talk to each other." Prior to that time Wang was never criticized for standing with or speaking to her fellow workers, and in fact Mrs. Kong would occasionally join their conversation. Ping Yuan Wu testified that Mrs. Kong first gave them that instruction on August 2. She conceded that she had a dispute with co-worker Jenny that day and Mrs. Kong asked them to separate themselves and stop arguing, and indeed Wu stated that on each occasion
 10 that she told them not to speak to each other she said they had to stop arguing. Wu stated that prior to August 2 she was permitted to speak with her co-workers during work hours and was never told that they could not do so. Wu also testified that on August 4, Mrs. Kong told the workers that they could not sit or stand in groups or have their meals together for thirty minutes as they had previously.²⁵ Rather, they had to eat in two groups, with each group taking fifteen
 15 minutes for their meal.

Mrs. Kong stated that employees are not permitted to congregate in groups during work hours because in doing so the employees are not at their assigned sections and would not be able to serve the customers in those sections. She testified that she warned them about such
 20 conduct before and after the petition was filed, but found that after its filing employees congregated more frequently. She did not know what they spoke about.

Kevin Kong stated that restaurant policy permitted employees to eat in groups during their meal or break time, but workers are not permitted to congregate together during work time
 25 in the dining room area. That practice was in effect before the petition was filed and was enforced after that time also. Kong denied that any policy permitted all the waiters to take their afternoon meal at the same time because customers remaining in the dining room must be served. The restaurant stops serving food at 3:00 p.m., at which time food is no longer replenished at the buffet tables, but customers stay beyond 3:00 and sometimes until 4:00 p.m.
 30 Kong said that usually the busgirls eat their afternoon meal at about 3:00 p.m. and usually eat their meals together.

2. Picking up Food and Keeping Their Area Clean

Wang testified that on August 6, Kevin Kong asked her to clean a small piece of dirt on the floor which she did. She testified that cleaning the floor was not her responsibility and she would not ordinarily perform that job since she was a busgirl in charge of the buffet tables. In contrast, busgirl Ping Yuan Wu testified that it was her responsibility to pick up small food items which fall on the floor, but she was not responsible to clean large items such as ice cream or a
 40 water spill which is the job of the busboys or cleaning person. Mrs. Kong and Kevin stated that busgirls must clean the area around the buffet table and the floor under it including picking up dropped food. In fact, they have instructed the busgirls to do such work before and after the petition was filed.

Mrs. Kong stated that employees were always responsible for keeping their assigned section clean which includes picking up food dropped on the floor. If a small amount fell on the floor the waiter was expected to clean it. If it was a larger amount he calls the busboy to help. She instructed waiters regarding such responsibility before and after the petition was filed, and the frequency of such instructions did not change.

²⁵ Wu's pre-trial affidavit did not mention these orders by Mrs. Kong.

3. General Criticism, Cell Phone Use and Leaving the Restaurant

Liu testified that after August 5, immediately after he and others were told by Mrs. Kong that she did not agree with their decision to join a Union and the Respondent would close the restaurant and that new rules would be instituted, he was criticized by Susan Kong. For example, when he walked with his hands behind his back while on duty she told him to put his hands in front of his body. He was also told by Susan Kong that he was not dressed neatly. He stated that prior to that time he was never criticized for such things.

Mrs. Kong also told Liu that he should not speak to co-worker Ma while on duty. In that instance, she told him that if he wanted to speak to Ma he should wait until he went home. In this respect, it should be noted that, according to the Respondent's written rule, "employees are not allowed to gather together in small groups, such as three to five people and chatting each other, nor to talk loudly." Apparently, therefore, the prohibition against speaking in groups referred only to three or more people, and not to groups of two, such as Liu and Ma.

Susan Kong also criticized Liu for making a cell phone call while on duty, telling him that he could not do so. Liu testified that prior to August 5 he was not criticized for making such calls. Regarding his cell phone use, when he was spoken to by Mrs. Kong, the restaurant was not busy, and that other workers, including the captain, hostess and cashier made cell phone calls while on duty.

Mrs. Kong testified that certain written rules were posted in the restaurant since its opening.²⁶ One of the rules was "proper attire, dress neatly." She warned those workers who wore wrinkled or soiled shirts that they must wear a clean and pressed shirt. She also told the employees that they must stand erect, in a professional way. She instructed the workers in this manner before and after the petition was filed. Kevin Kong gave similar testimony. He stated that he instructed employees concerning their posture and having unclean hands. Such a policy has always been in effect and it was enforced to the same extent before and after the petition was filed. He stated that the Respondent required its employees to wear clean, white shirts, have a presentable posture, and also warned them about how they stood.

Another rule was that workers should stay at their work posts. Mrs. Kong interpreted this as meaning that the workers must remain in their assigned section and could not go to another section and speak with workers there; nor could they leave the building while on duty. Mrs. Kong stated that before and after the petition was filed she warned employees that they should not leave the restaurant during work hours. She specifically recalled that she warned two waiters, Liu, and Ma or Chu, a few days after the petition was filed. She saw them standing outside the restaurant at about 1:00 p.m. during work hours making phone calls or speaking with each other for a long time. She stated that the frequency of her warnings to employees for such conduct was the same before and after the petition was filed. She did not give them a written warning because they immediately returned to the restaurant.

Mrs. Kong also told Chu and Ma that they could not leave the restaurant together for a break. At that time they stood outside the door to the restaurant during their afternoon break. Mrs. Kong told them that their job is inside, not outside, and that she did not hire them to watch the parking lot. Although Chu did not recall what day of the week that was, he conceded that if it

²⁶ Other more elaborate and detailed rules were first put in writing in September, 2005, after the strike began.

was a weekday, four waiters were assigned that day, and thus only two of the four were then available to serve customers while he and Ma were outside. Prior to that time Chu had been permitted to go outside during work hours for a short break, to make a phone call, or during their meal break when no customers had to be served and when all the customer bills had been paid.

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Kevin Kong also stated that it is the Respondent's policy that employees may not leave the building while they are on duty while customers are in their section. Such a policy was enforced both before and after the petition was filed, and about once per month he had to remind workers who violated this policy. He further stated that during the period of time that employees are not on duty – between 3:15 p.m. and 4:15 or 4:30, and during their dinner meal after 9:15 p.m., until closing time they are permitted to leave the restaurant unless customers remain in their assigned section.

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Cell phone use was prohibited while on duty. However, in an emergency Mrs. Kong permitted the workers to make a cell phone call but they should try not to do so during work hours. She also prohibited them from making such calls inside the restaurant or when customers were present in the restaurant. Mrs. Kong admitted that she spoke to Liu about his cell phone use after the petition was filed. She saw him making a call inside the restaurant while on duty. She motioned to him to put the phone away and he did so. Susan Kong told Chu that he was no longer permitted to use his cell phone in the restaurant during work hours.

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In this respect, the Respondent's written work rules first posted in September, 2005, states that employees "must stay at our working post. Absolutely no one will be allowed to read magazines, newspaper or watching television or frequently making cell phone calls during the work hours. On the other hand, employees are not allowed to gather together in small groups, such as three to five people and chatting each other, nor to talk loudly."

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Chu stated that his cell phone use and meetings with other employee took place during their lunch break when everyone leaves the restaurant but at staggered times. Chu first stated that during the employees' lunch break there are no customers in the restaurant, but then conceded that although it is closed to new customers at 3:00 p.m. some customers remain and continue eating. He recognized his responsibility to those customers who are still in his section. Only when he finishes his work and no customers remain in his section and their bills are paid, can the employees have lunch and leave the restaurant, as described. He stated that the employees take turns leaving the restaurant, smoking and making cell phone calls.

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Kevin Kong stated that the Respondent's policy prohibited the wait staff and busboys from making personal cell phone calls while on duty. They could make such calls while on their meal break. A few times per month prior to August 5 he warned employees when he noticed them using their phones that they must finish their call immediately, and they did so. He enforced this policy with equal frequency before and after the petition was filed. He further stated that the chefs and cooks are permitted to use cell phones during work hours to order supplies, but not to make personal calls. They make such calls outside the restaurant or in the dining area. In addition, kitchen workers are also permitted to go outside for a short break during work time. Such an accommodation is given to them when they are not currently needed in the kitchen and the temperature in the kitchen is usually very hot. If they are needed in the kitchen a loudspeaker can be heard outside the restaurant. Kevin Kong testified inconsistently first that there was no limit on the number of kitchen workers who can leave the restaurant at such times, but then testified that they are not all permitted to leave at the same time.

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4. Reassignment of the "Side Work" From the Wait Staff

Yu Chuan Chu testified that after the August 5 meeting, the wait staff was no longer assigned to do "side work" such as cleaning the vegetables. Instead, the busboys performed that task and the wait staff had to continue to serve customers. Chu testified that he did not complain about doing side work and did not tell Mrs. Kong that he did not want to perform such work. In fact he called such work a "break" from his normal duties and said that Mrs. Kong "stopped" them from having such a break by assigning such work to the buspersons. However, Chu also stated inconsistently that he complained about doing such work because he believed that, as a waiter, he should not have to do such work.

Mrs. Kong testified that side work was performed by the waiters when the restaurant was closed for lunch, which period of time was taken by the waiters as their lunch break. However, although the restaurant was closed during lunch, customers who remained there and continued eating would still have to be serviced by the wait staff. The practice was that the waiters would punch out during their meal break but would be asked if they wanted to do side work. If they did they punched in and were paid for that time. Chu and other waiters told Mrs. Kong that they did not like doing side work, complaining that they performed such work during their break time. She told them that if they did not want to do the side work they could punch out at lunch time and leave, but that she thought she was doing them a "favor" since she paid them for their lunch break when they did such side work. Accordingly, Mrs. Kong told the waiters that they would no longer perform side work. Thereafter, the busboys did such work. She could not recall if that change was made before or after the union petition was filed. She also noted that they would be paid overtime if they worked more than 40 hours per week, including the extra time during which they did the side work.

K. The Warning Notice to Yu Chuan Chu

On August 12, a customer that Chu was serving left a tip on the table and then left the restaurant without paying his bill. Chu checked the computer and learned that the bill had not been paid. He and captain Evelyn looked for the customer but could not find him. He stated that Evelyn told him that when the customer left the restaurant she asked if he had paid his bill. The customer said he did and she took no further action. Chu told Kevin Kong what Evelyn told him. At the end of the work day, Kevin Kong gave Chu a written warning which stated that his customer left the restaurant without paying his bill. The notice stated that the company policy was that "waiters are responsible to make sure their customers pay their bills," and directed that Chu pay more attention to his customers and make sure that they pay their bills before leaving the premises.

When Chu received the letter he told Kevin that the customer's failing to pay his bill was not his fault since he looked for the customer and Evelyn let the customer go even though she knew that they were looking for him. Chu offered to pay the amount of the unpaid check, but Kong replied that he did not have to, but that he would be given the warning letter instead. Chu told him that he (Kong) was just "playing games" with him and that he would be "in trouble" for doing so.

Kevin Kong stated that Chu made no explanation as to why the customer's failing to pay the bill was not his responsibility. Kong did not recall whether he asked anyone at the front desk or cashier what happened, and also stated that at that time he did not know whether Chu had signed a card for the Union or was involved in any efforts in behalf of the Union. In addition, Kong testified that prior to that time he spoke to Chu more than five times regarding customer complaints about his service.

Chu testified that he was unaware of any circumstance in which an employee did not receive a warning when a customer he was serving left without paying his check.

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L. The August 20 Strike

1. The Reasons for the Strike

10 Liu stated that on about August 17, the workers met and spoke about the Kongs' proposed changes announced on August 5 – that they would report their cash income for tax purposes, requests for immigration documentation, and their threat to close the restaurant if, according to Liu, they “create more trouble.” They also spoke about Yu Zhen Wang’s August 5 warning from Susan Kong that she must produce immigration documentation immediately or she would not be permitted to work.

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15 Liu and the workers thought that they would “compromise” with the Respondent since the workers had not, in the past, been asked to provide documentation and he and Hui Ma met with Mr. and Mrs. Kong and Kevin on Thursday, August 18. At the meeting, Mrs. Kong announced the following changes, effective the following Monday: (a) the workers would no longer receive tips (b) pay would be changed to \$13.00 per hour (c) the employees would only work five days per week and would punch in at 11:30 a.m. instead of 11:00 and (d) the workers would now pay \$1.50 per meal provided by the Respondent. The Respondent’s attorney noted at the hearing that all these alleged changes were the subject of charges which were dismissed by the Regional Office. Counsel for the General Counsel did not dispute that statement.

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25 Liu testified that Mrs. Kong also said that she would give a final warning to Yu Zhen Wang that day – that if she did not provide a social security card by the following day she would not be permitted to work. Hui Ma asked Mrs. Kong to explain the figures on his pay stub because the numbers did not seem correct. Mrs. Kong replied that the Respondent’s accountant made the computations. She added that the workers must begin work at once and if not, they could leave immediately. Liu stated that as he left the meeting Mr. Kong told him that “since you guys are causing all this trouble, I may just have to close down the business.”

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35 The following day, August 19, at about 3:00 p.m., Liu and other workers approached Mrs. Kong and told her that they did not agree with her statement the previous day that they would be paid \$13.00 without tips because they earned the tips they received. They also said that they did not agree to a reduction of work hours. They told her that her requirement that Yu Zhen Wang produce a social security card was wrong since she was a long-term employee, Mrs. Kong never required documentation from other workers, and the workers would “not accept” such a requirement now.

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On about August 19 or 20, the employees engaged in a strike and picketing. They distributed flyers during the strike. Two flyers were distributed, both of which complained of their low wages and loss of tips.

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One flyer stated that the actions of the employees was a “strike against unfair labor practices.” It further stated that after the Union filed its petition, the workers were interrogated and threatened that “if we stick with the union they will change our working conditions for the worst, and they threatened to close the restaurant.” It also stated that “our boss... constantly threatened to fire those of us who supported the union. Workers who supported the union were yelled at even if we conducted day-to-day conversation [sic] with co-workers.” It concluded that “we will strike for our job back, free from harassment!”

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The other flyer stated, in relevant part as follows:

We are on **STRIKE** because the restaurant violated Federal and State laws.

The restaurant:

- Fired the worker who stood up for labor rights
- Stole the workers' tips
- Retaliated against workers who support the union
- Made illegal house rules and regulations

....

We demand East Buffet immediately:

1. Stop all unfair labor practices.
2. Stop stealing tips.
3. Stop the harassment and retaliation against workers who support the union. Reinstatement the workers who were fired for standing up for their rights.
4. Reimburse all stolen tips, wages and withheld taxes to all employees.

(Emphasis in original)

Chu testified that the strike was, in part, to protest Lee's discharge. Liu testified consistently that the main reason for the strike was not the discharge of Lee. Rather, it was because of Mrs. Kong's announcement of the changes in working conditions, as set forth above, on August 18 and her comments that Wang would have to present a social security card in order to remain employed and that because of all the trouble the workers caused she may just close the restaurant.

2. The Offer to Return and the Offers of Reinstatement

On April 24, 2006, the Union sent a letter to the Respondent which stated: "On behalf of the following individuals, the 318 Restaurant Workers Union makes an unconditional offer to return to work: David Lee, Yu Chuan Chu, Bi Chen, Li Feng Liu, Xiu Zhu Lin, Hui Ma, Yu Zhen Wang, Mei Ying Zou, Ping Zhang, and Ping Yuan Wu."

On August 22, 2006, the Respondent sent letters to all of the above workers except David Lee and Mei Ying Zou. The letters, signed by Kevin Kong, stated that the Respondent "hereby offers you reinstatement to your position with the Restaurant. If you wish to accept this offer, please report to the Restaurant within ten (10) days after receipt of this offer and ask to see Kevin Kong. If you need additional time to accept this offer, please contact me at (917) 939-9579.

In separate letters dated September 9, Kevin Kong informed Yu Chuan Chu, Bi Chen, Li Feng Liu, Xiu Zhu Lin, and Yu Zhen Wang that at a meeting held with restaurant management and the respective employee on September 6 (September 15 for Liu), the employee was "unable to present documents necessary to complete Form I-9." The letter included a blank I-9 form and asked that it be provided to Kevin Kong by October 13, and that "upon doing so, you will be permitted to commence work." The letter noted that if additional time was needed, the employee must contact Kevin Kong no later than October 13, at which time the matter would be discussed by the employee and Kong and "based upon your particular circumstance, how much, if any, additional time you will be provided to present a completed Form I-9." The letter concluded by stating that if the employee failed to present a completed I-9 form by October 13

or request additional time to do so by October 13, “we will consider you to have waived any right to reinstatement.”

On October 13, the Union by letter requested additional time for the following employees to present a completed I-9 form: Bi Chen, Li Feng Liu, Xiu Zhu Lin, Hui Ma, and Yu Zhen Wang.

Kevin Kong stated that offers of reinstatement were not made to Lee or Ms. Zou. Ping Zhang returned to work because she presented proof of legal documentation. Chu and Ping Wu were reinstated effective October 4.

3. The Replacement of the Strikers

Mrs. Kong testified that the Respondent replaced certain employees who struck on August 20. She met with some of the applicants and Kevin met with others. They followed the same procedure and used the same criteria that she used when hiring regular employees. The replacement workers were not told that they would be employed only for the duration of the strike. Three busgirls and five waitresses were hired as replacements.

Thereafter, three strikers were rehired. In order to accommodate them, one took the place of a replacement employee who had quit, and one took the position of a replacement worker who was laid off.

Analysis and Discussion

I. The Supervisory or Agency Status of the Captains

The complaint alleges that the captains are supervisors or agents of the Respondent.

a. The Supervisory Status of the Captains

Section 2(11) of the Act defines a supervisor as:

Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving supervisory authority is on the party asserting it, and such proof must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 3 (2006); *Dean & Deluca*, 338 NLRB 1046, 1047 (2003). Purely conclusory evidence is not sufficient to establish supervisory status. The Board requires evidence that the employee actually possesses the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB No. 39, slip op. at 5 (2006).

The legislative history of this section establishes that the term “responsibly to direct” sought to distinguish two classes of workers: true supervisors vested with “genuine management prerogatives,” and employees such as “straw bosses, lead men, and set-up men” who are protected by the Act even though they perform “minor supervisory duties.” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4

(1947). The Board has used caution “not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.” *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

5 The evidence establishes that the only arguable supervisory authority possessed and/or exercised by the captains includes the assignment and responsible direction of employees. In *Oakwood Healthcare*, above, the Board adopted definitions for the terms “assign,” “responsibly to direct,” and “independent judgment.” Under each of those definitions it is clear that the captains do not exercise supervisory authority using independent judgment and cannot be
10 considered statutory supervisors.

“The authority to assign refers to the ‘act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.... In sum, to ‘assign’ for
15 purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... ad hoc instruction that the employee perform a discrete task.” *Oakwood Healthcare*, above, slip op. at 4

In order to find that a person responsibly directs employees, it must be shown that he
20 has the authority to direct the work – to decide ‘what job shall be undertaken next or who shall do it’ ... provided that the direction is both ‘responsible’ ... and carried out with independent judgment.” It must also be shown that the person directing has the authority to take corrective action, and that the putative supervisor is “accountable for the performance of the task by the employee, meaning that “some adverse consequence may befall the one providing the
25 oversight if the tasks performed by the employee are not performed properly.” *Oakwood Healthcare*, above, slip op. at 6, 7.

The above criteria for the finding of supervisory status, assignment of workers and responsibly directing them must be exercised with the use of independent judgment and not be
30 merely routine or clerical in nature. The use of independent judgment involves acting or recommending action “free of the control of others” by the use of forming an opinion or evaluation by discerning and comparing data. *Oakwood Healthcare*, above, slip op. at 8. Such judgment must involve a degree of discretion that rises above the “routine or clerical.”

35 Even assuming that the captains assigned and directed the workers to perform certain tasks such as which section to work at, such direction to employees who regularly performed such work constituted “routine” assignments and direction not involving the use of independent judgment. The captain assigned different tables to different employees on a rotational basis based on the previous day’s chart. He simply moved workers to a different table on each
40 succeeding day. Such a task is clearly routine and does not involve the use of independent judgment. *Croft Metals, Inc.*, 348 NLRB No. 38 (2006).

I accordingly find that the captains are not supervisors within the meaning of the Act. However, the General Counsel and the Union argue that they were the Respondent’s agents,
45 and that it is responsible for their statements.

b. The Agency Status of the Captains

In *California Gas Transport*, 347 NLRB No. 118, slip op. at 4 (2006) the Board set forth
50 the standard for determining agency status of an individual:

The Board applies common law principles of agency in

determining whether persons are acting with apparent authority on behalf of the employer. Apparent authority will result from a manifestation by the employer to a third party that creates a reasonable basis for the employee to believe that the employer authorized the action of the alleged agent. Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. The test for determining whether a person is an agent of the employer is whether, under all the circumstances, employees would reasonably believe that the alleged agent was acting on behalf of management when he took the action in question.

The evidence supports a finding that the captains are agents of the Respondent. They work each day even in the absence of the owners or manager Kevin Kong. The captains are the highest ranking person when the Respondent's officials are not present which is a frequent and regular occurrence. During the first half of July, 2005, neither the Kongs nor Kevin was present. During that time, the captains were in charge of the restaurant with a relative who acted as manager. There was no evidence as to how often that manager was present in the restaurant.

The captain was expected to notify Kevin Kong if there were problems with an employee and to report instances of poor work, and according to a written rule, the employees are directed to follow the instructions of the captains. In addition, a written rule requires the captain to notify the manager if "anything happens" and of incidents which are "out of the ordinary."

Based on the above, it is clear and I find that the Respondent placed its captains in a position which created a reasonable basis for its employees to believe that the captains were authorized to act for it, and that the employees could reasonably believe that the captains would transmit important information concerning the activities of the employees to management.

The captains acted as conduits of information from management to the employees, and from the employees to management. If an employee came to work sick or requested time off, he asked the captain who communicated with Kevin Kong and Kong's instructions were then transmitted by the captain to the employees. *Einhorn Enterprises*, 279 NLRB 576, 576 (1986). The workers were told to listen to the captains' instructions. The assignment of work to the wait staff, monitoring the employees' work and informing the manager of employee wrongdoing illustrate that the captains are conduits of information and therefore agents. *Quality Mechanical Insulation, Inc.*, 340 NLRB 798, 802 (2003).

Accordingly, Lee's answer to captain Evelyn that he could be expected to "overthrow" the restaurant and Liu's comment to captain James that he and Lee visited the Union and were advised that their pay was not proper are matters which could be expected to be reported to the Respondent's officials by its agents who acted as conduits of information to management. These are events which are out of the ordinary and would certainly be considered as matters in which the Respondent's officials would be vitally concerned.

Evelyn's statement that upon Mrs. Kong's return she would decide how long Lee would remain employed reflected her belief in the Respondent's attitude toward Lee. This finding is reinforced by Evelyn's later pointing at Lee and calling him a troublemaker at a meeting with his co-workers and Mrs. Kong in which he protested their working conditions. It is important to note that she made this statement within hearing distance of Mrs. Kong who did not disavow that comment. In this regard, Evelyn was part of the Respondent's management team, and although

not a supervisor her comment reflected her belief that Lee was causing problems for the Respondent. These incidents shed light on the Respondent's motivation for discharging Lee and demonstrate its animus toward him.

5 II. Credibility Determinations

Employees Ping Zhang and Li Feng Liu are plaintiffs in a lawsuit against the Respondent, the Kongs, and captains Raymond, James and Evelyn in which they seek more than \$1 million in damages for underpayment of wages and other claims. Ping Zhang said she was very angry at the Kongs but would not lie under oath in this proceeding. I have taken those matters into consideration in making the credibility findings herein.

The General Counsel's witnesses were mutually corroborative and testified consistently with each other as to the major events at issue. They testified in a forthright manner. Employee Zhang is still employed by the Respondent, having been reinstated. Her testimony was in distinct contrast to the Respondent's interest, particularly where she stated that Mrs. Kong told her that Lee "stirred up" many things including complaining to the boss about meals for the staff. See *Mar-Jam Supply*, 337 NLRB 337, 346 (2001), citing *Shop-Rite Supermarket*, 231 NLRB 500, fn. 22 (1977).

I was not impressed with Mrs. Kong's credibility. She stated that she inquired of her employees more than once per month whether they liked the food because it was important that they be happy, which she believed would lead to them serving the customers in a pleasant way. Accordingly, she was "very happy" when they complained about the food that was available for them. Notwithstanding that Mrs. Kong stated that she welcomed such complaints, as set forth above employee Wu stated that during the ride home that night after the employee meeting at which they objected to the food, she criticized Lee for complaining about the food and causing trouble in the restaurant. Mrs. Kong also told employee Zhang that she believed that Lee was causing trouble by raising the issue of staff food with her.

Mrs. Kong also inconsistently denied asking Wu any questions regarding the Union, but admitted asking if anything was wrong with her (Mrs. Kong) because many employees wanted Union representation.

Kevin Kong was equally unimpressive. He testified inconsistently that immediately after he learned that the petition was filed he asked Liu "why are you guys doing this?" because he believed that he was one of the employees who "wanted to ... start a union" but then testified that he did not know or suspect who was responsible for the Union's petition. Kevin Kong also testified inconsistently that there was no limit on the number of kitchen workers who could leave the restaurant for a short break, but then stated that not all of them could leave at the same time.

I was not impressed with Melissa Chiu's testimony. She was a long-time friend of Mrs. Kong, having gone to high school with her, and someone who dined at the restaurant frequently. Indeed, they had gone shopping together on July 31 and then ate dinner at the restaurant. Notwithstanding that she followed Mrs. Kong to the area where the plate was dropped because she was "nosy," she testified that thereafter she did not inquire of Mrs. Kong whether Lee was fired that night, only learning that information three weeks later, at the start of the strike, that Lee had been discharged.

Further, Chiu denied that anyone cleaned the plate while Mrs. Kong spoke with Lee despite the fact that Mrs. Kong testified that the plate was being cleaned during her

conversation with Lee. Indeed, if Chiu was in a position to overhear the conversation between Mrs. Kong and Lee, she should also have been able to notice that the plate was being cleaned as Mrs. Kong observed. In this respect I credit the testimony of employee Liu who denied seeing Chiu standing behind Mrs. Kong when she spoke to Lee.

Chiu further incredibly testified that she left the restaurant at about 10:00 p.m. denying knowing that Mrs. Kong met with employees that evening. In fact, the meeting with numerous employees was held, as testified by Mrs. Kong, in the bar area, which was adjacent to the table at which Chiu was seated. I can infer that the meeting was loud and noisy and could not have been missed by Chiu. The meeting, according to Liu's credited testimony continued until about 1:00 a.m. Contradicting her testimony that she left at about 10:00 p.m. and did not know that Mrs. Kong met with employees that night, Mrs. Kong stated that Chiu was "very polite" and stayed "very late" waiting for her. Employee Liu also stated that Chiu was at the restaurant until the end of the meeting, close to 1:00 a.m. In this respect I cannot credit Chiu's testimony that she did not learn that Lee was fired that night since that was the topic of the lengthy meeting held near her table.

There was also some discrepancy in the language spoken by Mrs. Kong and Lee. Chiu was the only alleged observer who stated that their discussion was in Mandarin. Other employee witnesses stated that they spoke in the Cantonese dialect.

I accordingly have credited the employee witnesses where their testimony differs from that of the Respondent's witnesses.

III. The Violations of Section 8(a)(1) of the Act.

A. The Interrogation of Employees

The complaint alleges that the Respondent interrogated its employees concerning (a) whether they joined the Union and their reasons for doing so (b) what benefits they expected from the Union and (c) whether they signed the letter protesting Lee's discharge.

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer ... to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

Although interrogation is not per se unlawful or objectionable, the test is whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984). In evaluating the "totality of the circumstances," the Board considers such factors as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, the truthfulness of the reply, whether a valid purpose for the interrogation was communicated to the employee, and whether the employee was given assurances against reprisals. *Rossmore*, above, at 1178 fn. 20; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).

As set forth above, the employees signed a letter of protest in which they voiced their disagreement about their working conditions and treatment by the Respondent and the alleged

unfair discharge of Lee. Mrs. Kong held a group meeting and separate, private discussions with the workers. I credit the testimony of employees Liu and Chu that she asked them who wrote the letter, and her question of Chu as to whether anyone forced him to sign, and the further testimony of Zhang, as to why she signed it. I also credit the testimony of Wang that Mrs. Kong asked her if she signed the letter and why. I also credit the testimony of Wu that Mrs. Kong asked her whether she joined the Union and inquired as to the benefits of union membership.

Kevin Kong admitted that after he learned that a union petition had been filed, he asked Liu "why are you guys doing this." Liu stated that Mrs. Kong asked him the same question. Chu stated that Mrs. Kong asked the workers in a meeting why they joined the Union. Wang also credibly testified that Mrs. Kong asked her if she joined the Union.

In writing the protest letter, the employees were engaging in protected, concerted activities. *Champion Home Building Co.*, 343 NLRB 671, 680 (2004). They voiced their opinions about their working conditions and sought redress of the conditions that they believed were unfair and unreasonable. While it is true that they signed the letter and were therefore open about their protest, it is equally clear that they were not open and active union supporters. They visited the Union on two occasions but did not openly solicit for the union or engage in other obvious union activities. When viewed under the "totality of the circumstances" test it is clear that the interrogations set forth above violated the Act. All of the questioning was undertaken by the owner of the Respondent, Mrs. Kong and her son who was the manager. Many of the conversations took place at the instance of Mrs. Kong and were held in private in her basement office. No assurances were given that the employees would suffer no reprisals as a result of their conversations with Mrs. Kong.

The questioning had no valid purpose. Although it is clear that Mrs. Kong also asked for the employees' views on her firing of Lee during the course of the interrogations, the main object of the inquiries was to learn who prepared the letter of protest, to confirm whether the workers signed the letter of protest, why they did so, and whether anyone forced them to sign it. All such inquiries are not permissible. *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003). The Respondent argues that Mrs. Kong would not have asked them if they signed the letter since it contained the names of the signatories. Although she knew whose names appeared on the letter, it is obvious that by asking them to confirm that they signed it, she expressed her displeasure at their doing so.

Mrs. Kong claimed that she spoke to the employees about the protest letter because she did not believe that the wait staff were aware of her reason for firing Lee and that she wanted to ask whether she should reinstate him. Inasmuch, according to her testimony, as she directed that all the employees be present at the meeting the previous night during which she explained why she fired Lee, it was therefore unnecessary to privately interview the employees the next day to repeat her reasons for discharging him. Further, her inquiries about whether she should reinstate Lee were disingenuous since she had already decided, immediately after firing him, that she would not reinstate him. This is illustrated in the statements of Kevin Kong and James to Lee that Mrs. Kong told them that she would not reinstate him. In addition, she admitted that she would rather close the restaurant than reinstate him.

Equally impermissible and coercive are the questions asked by Mrs. Kong and Kevin as to whether and why the employees joined the Union and inquiries as to the Union's benefits. *TKC, a Joint Venture*, 340 NLRB 923, 924 (2003); *Assn. of Community Organizations for Reform Now (ACORN)*, 338 NLRB 866, 870 (2003).

I accordingly find that the questioning set forth above violated the Act.

B. The Creation of the Impression of Surveillance

It is unlawful under Section 8(a)(1) of the Act for an employer to create an impression that it is watching or monitoring its employees' protected union activity, or in other words, to create the impression of surveillance. The underlying premise is that employees should be free to participate in union activity without fearing that members of management are peering over their shoulders, noting who is involved in union activities and to what extent or how.

The test for determining whether an employer has created an impression of surveillance is whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); *St. Thomas Gas*, 336 NLRB 711, 719-720 (2001).

The complaint alleges that Mrs. Kong gave the employees the impression that their membership and activities on behalf of the Union were under surveillance. In support of this allegation, Chu testified that Mrs. Kong told him that she wanted to find out who forced employees to sign the letter of protest. I cannot find that by this statement Mrs. Kong created an impression of surveillance. Her comment did not imply that she would keep employees' conduct under surveillance, particularly about such an event as the signing of the protest letter that had already occurred. I accordingly will dismiss this allegation of the complaint. Even assuming that Mrs. Kong's statement constituted another instance of interrogation, a remedy for such a violation would be cumulative of the remedy to be awarded for other instances of interrogation.

C. Threats to Employees

The complaint alleges that the Respondent threatened its employees with more arduous and less desirable duties if the Union succeeded in its campaign to represent them.

As set forth above, in early August, Mrs. Kong asked Wu whether she joined the Union and also asked for a description of Union benefits. Mrs. Kong told her that she did not want her employees to join the Union and told her that she wanted her to assign her to work at the salad bar. Wu declined the assignment and she was not transferred to that position. Mrs. Kong's statement that she wanted to assign Wu to the salad bar is alleged as an unlawful threat. Mrs. Kong testified that she knew that Wu did not want to work at the salad bar. Wu's reasons were physical and emotional, as set forth above.

The evidence establishes that Mrs. Kong's suggestion that she would assign Wu to the salad bar was a threat to assign her to duties that she knew Wu did not want. Although an employer has a right to make such an assignment, here it is clear that the assignment was suggested because of Wu's positive response that in China unions are helpful to the workers. Despite the fact that Wu denied joining the Union, it is clear that Mrs. Kong sought to make the impression that she should not do so. This is reinforced by Mrs. Kong's statement that she did not want the workers to join the Union.

Inasmuch as Mrs. Kong's suggestion to Wu that she would assign her to the salad bar came in the same conversation as her unlawful questioning of Wu, it is clear that the proposal was an implied threat that she would or could be assigned to the salad bar if she joined the Union. *Buckeye Electric Co.*, 339 NLRB 334 fn. 1 (2003).

The complaint further alleges that the Respondent threatened employees that it would close the restaurant if they joined the Union. As set forth above, employees credibly testified

that Mrs. Kong and possibly Mr. Kong, who did not testify, threatened to close the business, Mrs. Kong saying that in the context of telling her workers that she did not want her employees to join a union. This threat to close interferes with workers' Section 7 rights. *Gissell Packing Co.*, 395 U.S. 575, 618-619 (1969). Although Mrs. Kong stated that she threatened to close the restaurant if she had to reinstate Lee, in view of the fact that I find Lee's discharge violative of the Act, such a statement, by itself, that the Respondent would rather close than reinstate an unlawfully discharged employee, violates the Act. But, as quoted by Wu, Mrs. Kong said that if she reinstated Lee he would only cause "more troubles," an apparent reference to his union activities, and she would close the restaurant rather than reemploy him. Clearly, this reference to Lee's causing "troubles" if he was reinstated and her desire to avoid such troubles by simply closing, too, by itself, violates the Act.

Related to the threat to close the restaurant, the complaint alleges that the Respondent informed its employees that it would be futile for them to join the Union because the employees would not benefit from it. In support of this allegation, Liu gave credited testimony that Mrs. Kong told him that she disagreed with the employees' plan to "organize a union," and that Mr. Kong said that their full income would be reported, Wang stated that Mrs. Kong told them that new rules would be instituted, and, as set forth above, in the event of unionization, the restaurant would just close. In these circumstances, the Respondent's statements that a union would not be organized "were clearly intended to and had the effect of conveying to the employees the futility of their support of the Union in violation of Section 8(a)(1) of the Act." *Wellstream Corp.*, 313 NLRB 698, 706 (1994).

The complaint alleges that the Respondent threatened employees that if they joined the Union, it would have to examine the documentation of all employees who do not possess immigration documents and also alleges that if the Union was successful in its campaign to organize them it would have to obtain certain employment documents from them.

Mrs. Kong admitted telling Wang on two separate occasions that she would have to provide immigration documentation. Wang said she asked for a social security card, which could be "fake." Mrs. Kong warned her that the Union would not be good for her because she is undocumented and Mrs. Kong would have to proceed "according to the rules." There was also uncontradicted testimony that Mr. Kong also told the employees that if they joined the Union he would have to secure immigration documentation from them, and those not possessing such papers would be fired.

The fact that Mrs. Kong conceded that she began asking for such documentation in August supports a finding that she did so because of the Union's advent. She stated that she began receiving advice to document her employees' immigration status five months before, in March, but did not begin doing so until August. This serves to support the employees' testimony that she began asking for immigration documentation because the employees were seeking union representation. The Respondent violated the Act by threatening that immigration documents would be required if the employees sought union representation. *Regal Recycling, Inc.*, 329 NLRB 355, 371 (1999).

The complaint further alleges that the Respondent threatened employees with discharge if they did not cease their work stoppage in support of Lee. As set forth above, Liu and Lee testified that Kevin Kong said that if they did not return to work immediately they would be fired. However, Lee also testified, consistently with Kevin Kong, that Kong told them that if they did not return to work he would treat them as having quit. I credit Kong in this regard. Lee clearly testified that when Kong said that they will be treated as if they quit, they replied that "we are not refusing to work." That response surely indicates that it was an answer to Kong's statement that

they were quitting by refusing to work. Inasmuch as Lee was present at this time and heard a different version of Kong's statement than Liu I cannot find credible his initial testimony that Kevin Kong threatened to fire the workers if they did not return to work. I accordingly find that the General Counsel has not proven that a threat was made in this alleged statement of Kevin Kong.

I will accordingly dismiss the allegation of the complaint that alleges that employees were threatened with discharge if they did not return to work in protest of Lee's discharge.

IV. The Violations of Section 8(a)(3) of the Act

A. The Discharge of David Lee

The complaint alleges that the Respondent discharged Lee on July 31 in violation of Section 8(a)(3) of the Act because he and his co-workers joined and assisted the Union.

To satisfy her threshold burden of proof under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) the General Counsel must establish that the Respondent was aware of Lee's union activities, and that his union activity was a substantial or motivating factor in the Respondent's decision to discharge him. *Manno Electric*, 321 NLRB 278, 281 (1996). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of Lee's union activity.

It is not alleged that Lee was fired because he engaged in protected, concerted activities although there was ample evidence that he had engaged in such activities and was fired for that reason. *Chinese American Planning Council, Inc.*, 317 NLRB 202, 207 (1995). Indeed, the General Counsel expressly stated that by adducing such evidence she did not seek a finding that he was discharged for engaging in protected, concerted activities. Rather, she stated that such evidence was presented as "background" and "history" to demonstrate that the Respondent did not like the fact that he was "outspoken," he was considered as a "troublemaker" and that the Respondent bore animus toward him for engaging in such activities which "led ... to his discharge."

The Board has held that an employer's statements which cannot form the basis of a finding of an unfair labor practice "may be used as background evidence throwing light on the Respondent's motivation for conduct within the 10(b) period." *Oklahoma Fixture Co.*, 314 NLRB 958, 959 fn. 3 (1994). Such conduct may also be used to show antiunion animus. *Gencorp.*, 294 NLRB 717, 717 fn. 1 (1989). Here, the Respondent's statements were a reaction to Lee's protected concerted activities and are being considered as evidence of its motivation for firing him and as evidence of its antiunion animus which led to his unlawful discharge for engaging in union activities.

As set forth above, Lee disregarded the Respondent's instructions to stay out of the restaurant during the visit of the DOL agents. After the agents left, the Kongs berated him for answering the agents truthfully concerning his method of remuneration and captain James made an accusation that Lee was "playing games" with the Respondent. Lee's distribution of the agents' business cards to James and other employees at a time when the Kongs were in a position to see him clearly had a role in his later being called a "troublemaker" by Mrs. Kong.

It is important to note that the following incidents occurred in a relatively short period of time in early July and mid-July shortly before the Kongs returned from their vacation. They were

away from the restaurant for nearly six weeks and within that time period Lee visited the Union. Thereafter, statements of Mrs. Kong and captain Evelyn demonstrated that the Respondent bore animus toward him for his union activities. Thus, his involvement with the Union, the negative comments made toward him by the Respondent and his discharge occurred in a short, less than three-week period after the Kongs returned from their vacation. It is obvious that during this compressed period of time the Respondent believed, by virtue of their statements about him, that his involvement with the Union should be halted by his discharge.

In July, Lee discussed with Liu his belief that the wait staff was not being paid properly and that they should attempt to obtain back pay. Liu credibly testified that captain Evelyn overheard them and asked if they were trying to “overthrow” the restaurant to which Lee answered “yes.” Evelyn then told Liu that Mrs. Kong would make a decision as to whether Lee should be terminated when she returned from China.

Two weeks before Lee’s discharge, Liu informed captain James that he and Lee met with the Union, and that their pay was not proper. According to Kevin Kong, captains are expected to inform the Kongs if anything out of the ordinary occurs. Clearly, employees telling the captain that they met with the Union and were informed that their pay was improper were matters that the captains would be expected to tell the Kongs.

It is clear that inasmuch as the Kongs expected the captains to keep them informed of matters which were “out of the ordinary” or if “anything happens,” it may be inferred that James would have brought to their attention the fact that Liu said that he had visited the Union with Lee and that their pay practices were being challenged. It may also be inferred that Evelyn informed Mrs. Kong of Lee’s attempt to obtain his proper pay. As the Respondent’s agents and conduits of information between the employees and management, it may be inferred that the captains informed the Respondent of these matters.

On July 19, Lee acted as spokesman for a group of workers in complaining about the food they were given for meals and asking that the wait staff and busgirls be permitted to take food from the buffet for their dinner. During his presentation to Mrs. Kong captain Evelyn gestured toward Lee and mentioned that he was a “troublemaker.” After that meeting busgirl Wu was asked by Mrs. Kong why Lee continued to stir up so much trouble in the restaurant, and complaining that the food was not good, noting that it would not be easy for him to get a job elsewhere. On July 31, Lee was discharged allegedly for failing to attend to a child who dropped a plate.

Based on the above, I find that Lee engaged in union activities, those activities became known to the Respondent, and that the Respondent bore animus toward him because of those activities. I also rely on the Respondent’s statements, set forth above, that the Respondent’s captain believed that Lee sought to obtain his proper pay, and told his co-worker that Mrs. Kong would decide whether to fire Lee. It is clear that the Kongs regarded Lee as someone who made much trouble for them and implied that he would be fired by telling his co-worker that it would not be easy for him to find work outside the Respondent. Those statements shed a piercing light on the Respondent’s motivation for his discharge and are clearly evidence of antiunion animus.

Statements of an employer made after the discharge are relevant to the issue of the Respondent’s animus. *K.W. Electric, Inc.*, 342 NLRB 1231, fn. 5. (2004). Thus, Mrs. Kong told Wu that Lee would not be reinstated because he told Kevin that his “brotherhood” wanted him to return to work. This clearly implies that she resented the fact that he joined together with his co-workers to join a union. The Respondent’s antiunion animus is also amply demonstrated in the findings, made above, in which, shortly after his discharge the Respondent’s officials

interrogated employees as to whether they joined the Union and their reasons for doing so, interrogated them concerning what benefits they expected from the Union, threatened Wu with a transfer to a position that the Respondent knew she did not want, threatened employees that if they joined the Union the Respondent would have to examine their immigration documentation, threatened to close the restaurant if they sought union representation and harassed them in the performance of their duties, as set forth above. Although these violations occurred after Lee was discharged, they are relevant to the issue of the Respondent's animus. *K.W. Electric, Inc.*, above. The Respondent's actions occurred within one week of Lee's discharge and exhibited its strong antiunion sentiment which lend support to a finding that his discharge was unlawful.

I accordingly find that the Respondent was motivated by Lee's union activities in discharging him. *Wright Line*, above. Having made this finding, the burden of proof then shifts to the Respondent to prove that it would have discharged Lee even in the absence of his union activities.

There is no dispute that Lee was present within hearing distance when the plate dropped. He was discharged allegedly for not protecting the child patron who dropped the plate and who allegedly attempted to pick it up.

The testimony of Lee and the other witnesses on behalf of the General Counsel are credited. It was their testimony that Mrs. Kong only asked Lee why he did not clean the plate. His credited response was that someone was already cleaning it when he was approached by Mrs. Kong. His answer to Mrs. Kong is supported by Zhang who stated that she immediately went to the area and cleaned the plate, and by Mrs. Kong who said that when she approached Lee someone was already cleaning the area. Accordingly, Lee's testimony as to this incident is more believable than Mrs. Kong's. Further, the credited testimony of employee witnesses was that the child dropped the plate and then left the area immediately. The testimony of Mrs. Kong and Ms. Chiu that the girl attempted to pick up the plate cannot be credited. First, it took a period of time for Mrs. Kong to arrive at the scene – when she heard the plate drop she stood up, looked toward the area, then sat down and then some seconds later walked to the area. Employee Liu credibly testified that after the plate dropped he saw the girl walk quickly from the area. Clearly, she was no longer in the area by the time Mrs. Kong got there. Accordingly, there was no need to warn her not to touch the plate.

Although none of the employees who testified stated that they heard Mrs. Kong tell Lee that he should have helped the girl, their letter of protest presented on August 2 stated that Mrs. Kong gave as a reason for his discharge that he "did not attend to the girl who dropped the plate." Such accusation made by Mrs. Kong thus did not occur at the time of the incident but only later, during the meeting with employees. However, inasmuch as I find that the girl left the area immediately and there was no credible evidence that she attempted to pick up the plate, Mrs. Kong's assertion that Lee's inaction put her at risk is not credited.

The evidence supports a finding that Mrs. Kong sought an opportunity to rid the Respondent of Lee who she regarded as a troublemaker and whose activity in behalf of the Union came to her knowledge. She seized upon the plate incident and seeing that a child was involved in a potentially dangerous situation decided to fire Lee because of his proximity to the incident.

Inasmuch as Mrs. Kong did not expect Lee to pick up the plate or clean the area, his refusal to do so should not have resulted in his discharge. But that was what he was accused of at the time of his discharge, and that was what he was fired for. Accordingly, Mrs. Kong, by her own testimony would not have discharged him for not picking up the plate. Therefore, the

Respondent has not met its burden of proving that it would have discharge Lee for that conduct. *Wright Line*, above.

The evidence also establishes that other employees were present in the area to the same extent as Lee when the plate dropped. Thus, busgirl Zhang who immediately arrived to clean up the plate and Liu were there. Nevertheless, Mrs. Kong zeroed in on Lee for criticism and discharge for not attending to the broken plate. I recognize that Mrs. Kong testified that she only saw Lee at that time, but especially considering that the plate was immediately picked up and the area cleaned by Zhang, her reaction in firing Lee was clearly exaggerated which leads to the conclusion that the discharge was effected for unlawful reasons.

Mrs. Kong's testimony concerning the numerous complaints she and her son made to Lee do not withstand scrutiny. None of them, other than the two written warnings, were documented. Further, notwithstanding the number of complaints against him, no discipline was taken against him. This stands in contrast to Mrs. Kong's testimony that she discharged others for similar complaints, such as being impolite to customers, laziness and failing to cooperate. As to the two written complaints, both were made following Lee's protected concerted activity of meeting with the DOL agent and distributing her business cards. Lee received no written warnings, and no written record of those alleged warnings was made.

I accordingly find and conclude that the Respondent has not met its burden of proving that it would have discharged Lee even in the absence of his union activities. *Wright Line*, above.

B. The Alleged Harassment of Employees and Changes in their Conditions of Employment

The complaint alleges that since August 5, the Respondent harassed its employees and engaged in certain conduct because they protested Lee's discharge, because of their Union membership and activities and because they engaged in other protected concerted conduct.

The evidence fully supports a finding that the Respondent's wait staff including the bus persons engaged in Union and protected, concerted activities by openly and vocally protesting the Respondent's policy of not permitting them to take food from the buffet, by protesting Lee's discharge, attending Union meetings, and by signing the letter protesting Lee's discharge which included complaints about working conditions. Section 7 of the Act provides that employees have the "right to engage in concerted activities for the purpose of collective-bargaining or other mutual aid or protection." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) where the Court stated that the "policy of the Act [is] to protect the right of workers to act together to better their working conditions." The Respondent was aware of such activity.

The evidence also supports a finding that following their Union and protected activities, the Respondent instituted new rules or more closely enforced existing rules, began a campaign of increasing its scrutiny of its employees, more closely supervised them, and criticized them as set forth below.

The evidence supports a finding that the Respondent was motivated in taking certain of the actions below as to which I find violations because of the employees' union and protected, concerted activities in complaining about their conditions of work and protesting Lee's discharge, all of which the Respondent was aware of. *Wright Line*, above. The Respondent's defenses will be discussed below.

1. Closer Supervision, Complaints and Harsh Criticism Over the Manner in Which They Performed Their Duties

As set forth above, Liu was criticized for his manner of dressing and walking with his hands behind his back. It is significant and supportive of the General Counsel's case that Liu credibly testified that such criticism was made for the first time immediately after August 5, when he and others were told by Mrs. Kong that she did not agree with their decision to join a Union, the Respondent would close the restaurant, and that new rules would be instituted. On the other hand, I cannot credit the testimony of Mrs. Kong and her son that such criticisms took place routinely prior to the Union's advent.

Although the Respondent's rules which were in effect in August may be broadly interpreted to prohibit this type of conduct, the timing of the criticism coming shortly after the employees, with Liu as their outspoken leader were threatened and interrogated by Mrs. Kong for their Union and protected concerted activities, supports a finding that the criticism was made because of such activities. *Classic Sofa, Inc.*, 346 NLRB No. 25, slip op. at 18 (2006). I accordingly find that the Respondent has not met its burden of proving that it would have engaged in this conduct in the absence of the employees' union and protected, concerted activities.

2. Assigned Additional and Less Desirable Duties Which They Had Never Performed Before

In support of this allegation of the complaint, the General Counsel asserts that the Respondent's instruction to the busgirls to clean areas and perform certain duties that were normally performed by the busboys and the cleaning employee was unlawful.

Specifically, the General Counsel refers to the testimony of busgirl Wang that on August 6, Kevin Kong asked her to clean a small piece of dirt on the floor which she did. Although I find that Kong asked Wang to do so, I cannot find that his instruction violated the Act. Another busgirl, Wu, stated that picking up small food items was part of her job, but that large spills and large items were not. The testimony is clear that busgirls were responsible to keep the buffet area clean which includes the floor in the immediate area.

I accordingly cannot find that the General Counsel has proven a violation in Kevin Kong's request that Wang pick up a small piece of dirt.

3. Reassignment of More Desirable Work From the Wait Staff to Bus Persons

The complaint alleges that more desirable side work was taken from the wait staff and given to the bus persons. As set forth above, Yu Chuan Chu testified that after the August 5 meeting, the wait staff was no longer assigned to do "side work" such as cleaning vegetables. Instead, the busboys were given that task and the wait staff had to continue to serve customers during their lunch break. Chu testified that he did not complain about doing side work and did not tell Mrs. Kong that he did not want to perform such work. In fact he called such work a "break" from his normal duties and said that Mrs. Kong "stopped" them from having such a break by assigning such work to the busedpersons. However, Chu also inconsistently stated that he complained about doing such work because he believed that, as a waiter, he should not have to do such work. Mrs. Kong stated that in response to the waiters' complaints she reassigned the work to the bus persons.

Inasmuch as Chu's testimony is not clear as to whether he considered the performance of side work to be onerous or a welcome break, or whether he complained to Mrs. Kong about doing such work or not, I cannot find that the General Counsel has proven that the reassignment of such work from the wait staff to the bus persons was a violation of the Act.

**4. Directing Employees Not to Speak to, or Eat With Other Employees
or to Accept Cell Phone Calls While on Duty**

The complaint alleges that on about August 4, Mrs. Kong directed employees not to speak to, or eat with other employees, or to accept cell phone calls while on duty.

As set forth above, the Respondent's written rule adopted in September, 2005, prohibited employees from congregating and speaking to each other "in small groups such as three to five people." Accordingly, Liu's speaking to co-worker Ma while on duty which was criticized by Mrs. Kong did not violate that rule. There was no showing that a written rule was in force prior to that time or that the Respondent had a more strict rule prior to September, 2005. However, a written rule which predated the unionization effort was that workers should stay at their work posts. Mrs. Kong interpreted this as meaning that the workers must remain in their assigned section and could not go to another section and speak with workers there. However, inasmuch as the wait staff worked in groups of two to four waiters and busboys it is clear that that number of employees would be in the same work area and therefore would not be leaving their work post to speak to their co-workers.

As set forth above, according to the credited testimony of busgirl Wang, Mrs. Kong directed her and two others not to stand together or to talk to each other. This was the first instance where they were criticized for such conduct and in fact, in the past Mrs. Kong would join their conversation. Also, busgirl Wu stated that prior to August 2 she was permitted to speak with her co-workers during work hours. Further, Wu credibly testified that Mrs. Kong told them on August 4 that they could not sit or stand in groups or have their meals together.²⁷

In acknowledging that after the petition was filed employees congregated more frequently, Mrs. Kong implies that she took no action prior to its filing to correct this perceived violation of the Respondent's rules, but that only after the petition she regarded their meeting in groups as impermissible. Mrs. Kong's defense to this change was that by congregating in groups the employees were not at their assigned sections and therefore could not serve customers in those sections. She stated that she warned them about such conduct before and after the petition was filed.

Mrs. Kong also told the busgirls that they had to eat in two groups, and not one. This new rule could only serve the purpose of thwarting employee communication and further organization efforts. Inasmuch as they were permitted to eat together prior to the filing of the petition in early August, the Respondent has presented no reason why they could not have continued to do so after the petition was filed. See *Diamond Electric Mfg. Corp.*, 346 NLRB No. 83, slip op. at 38 (2006).

The complaint alleges that the Respondent prohibited its employees from accepting cell phone calls while on duty. Mrs. Kong testified that the Respondent prohibited the use of personal cell phones for personal calls during work time and while customers were present

²⁷ In this respect, I acknowledge that the charge alleging that a change in their meal time violated the Act was dismissed by the Regional Director.

because she considered it to be unprofessional. However, such phones could be used in an emergency during work time if necessary. The Respondent's written rule adopted in September, 2005 states that no one is permitted to "frequently" make cell phone calls during work hours. If anything, this rule makes the point that cell phone calls were permitted prior to September, 2005 and thereafter regardless of the presence of customers, and that only "frequent" calls were impermissible. In view of the fact that there was no written rule in effect prior to September, 2005 to support the Respondent's testimony that it had a stricter rule prior to September, 2005, the testimony of the Respondent's witnesses is not credited.

Employees Chu and Liu testified that after the petition was filed in early August, Mrs. Kong criticized each of them for making a cell phone call while on duty. Mrs. Kong conceded that she criticized Liu in that manner after the petition was filed. Liu stated that other workers made such calls during work time. There was testimony that Mrs. Kong permitted the kitchen workers to make cell phone calls only as they related to their work but of course no one could monitor such calls to determine who they were actually speaking to. Chu credibly testified that prior to the filing of the petition he had been permitted to make cell phone calls while on duty.

Although Mrs. Kong and her son testified that they frequently warned employees not to make cell phone calls while on duty, such warnings were not reduced to writing and are therefore not reliable.

In view of the fact that, according to the credited testimony of Chu and Liu, cell phone calls were permitted during work time until the petition was filed, I find that the sudden prohibition of such use was prompted by the employees' interest in organization. I accordingly find that the Respondent has not met its burden of proving that it would have taken the actions above even in the absence of the employees' protected, concerted activity. *Wright Line*, above.

C. The Written Warning to Chu

As set forth above, in August, 2005, Chu received a written warning for not ensuring that his customer paid his bill before leaving the restaurant. Chu admits that the customer did not pay but his defense is that captain Evelyn was aware that he did not pay and even looked for him before he left. Indeed, according to Chu's uncontradicted testimony, Evelyn asked the customer if he paid and was told that he did. Evelyn did not testify. Kevin Kong denied that Chu told him about Evelyn's involvement in the matter.

It appears that the Respondent imposed some form of discipline on waiters whose customers did not pay their bill even before the Union's advent. First, it asked that the waiters pay the bill themselves, and then it adopted a uniform rule beginning in March, 2005 whereby it issued warning notices to employees whose customers did not pay. The record supports a finding that warnings were issued to employees when their customers left the restaurant without paying.

The General Counsel cites one alleged instance in which the nonpayment of a bill was excused. Liu testified that in early March, 2005, he was told by James that James' customer left without paying and that Kevin Kong did not issue a warning notice to James. Left unexplained was why James, a captain, acted as a waiter on that occasion and also why Kong would not be permitted to excuse his agent from such wrongdoing. Accordingly such alleged evidence of one isolated incident does not support a finding that Chu was subject to disparate treatment.

In finding that Chu's warning did not constitute a violation of the Act, I have taken into consideration that Chu was the first to approach the Union, was outspoken about Lee's

termination, delivered the Union's petition to management and was believed by Kong to be the person who began the unionization effort. Accordingly, even assuming that the General Counsel was able to prove that the warning was motivated by Chu's Union and protected concerted activity, I find that the Respondent has proven that it would have issued the warning even in the absence of such activity. *Wright Line*. I will recommend that this allegation be dismissed.

D. The Strike

1. The Nature of the Strike

"It is well settled that if a strike is caused in part by an employer's unfair labor practice, the strike is an unfair labor practice strike. An unfair labor practice strike occurs even when the employer's unfair labor practice is not the sole or major cause or aggravating factor; it need only be a contributing factor." *RCG (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1633 (2001).

The unfair labor practices found above all took place in a relatively short period of time, from July 31 when Lee was discharged through about August 8. Accordingly, in such a compressed period of time the employees were subject to intense employer interference with their Section 7 rights and discrimination because they exercised those rights. I find that their decision to strike on August 20 was a direct result of the Respondent's unfair labor practices and their strike was an unfair labor practice strike from its inception.

This finding is supported by the flyers distributed by the Union during the strike. They noted that the employees were striking in protest against the unfair labor practices committed by the Respondent and specified those violations found here: the discharge of Lee, harassment and retaliation against workers who support the Union, illegal house rules and regulations, and interrogation and threats. *Precision Concrete*, 337 NLRB 211, 212 (2001) where unfair labor practice strike language was contained in picket signs displayed during the strike. In addition, Chu testified that the strike was, in part, to protest Lee's discharge.

Liu's testimony that part of the main reason for the strike was Mrs. Kong's announcement, the day before the strike, of changes in working conditions which were not found to be unfair labor practices does not detract from this finding. First, Liu stated that such changes were the "main" reason, not the sole reason for the strike. Second, he added that her additional comment made at that time, that Wang would be required to present a social security card to continue working and Mr. Kong's statement that because of all the trouble the employees were causing he may close the restaurant, were further reasons for the strike. I have found that such threats were unfair labor practices. As such they clearly show that the employees decided to strike in protest of the Respondent's unfair labor practices. In addition, at the employee meeting on August 17, three days before the strike, the workers spoke about the Respondent's unfair labor practices such as its requests for immigration documentation, the threat to close the restaurant if they "create more trouble" and Lee's discharge. Those matters surely were part of the reason for the strike three days later.

2. The Offer to Return and the Failure to Reinstate

On April 24, 2006, the Union made an unconditional offer to return on behalf of ten employees including Lee. Nearly four months later, on August 22, the Respondent offered reinstatement to eight of those strikers.

"Under well-established Board law, an employer is required to reinstate unfair labor practice strikers upon their unconditional offer to return to work." *Boydston Electric*, 331 NLRB

1450, 1453 (2000). Inasmuch as the strikers were not reinstated upon the offer to return made in their behalf, the Respondent violated Section 8(a)(3) of the Act. *Boydston*, above.²⁸

In reinstating the unfair labor practice strikers, the Respondent has a duty to discharge, if necessary, strike replacements hired during the strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278-79 (1956).

I will leave to the compliance phase of this matter the questions raised and the evidence presented concerning the offers of reinstatement to strikers who may have been undocumented workers.

Conclusions of Law

1. By interrogating employees as to who wrote a letter of protest, if they signed it, whether anyone forced them to sign, and why they signed it, the Respondent violated Section 8(a)(1) of the Act.

2. By threatening employees with transfers to different assignments which it knew were not acceptable to employees, with closure of the restaurant if they joined the Union, by threatening that it would examine the immigration documentation of its employees if they joined the Union, and by telling them that it would be futile to join the Union, the Respondent violated Section 8(a)(1) of the Act.

3. By criticizing its employees because of their protected, concerted activities, directing its employees not to speak to co-workers while on duty, telling its employees that they had to eat in two groups and not together, and prohibiting its employees from making or receiving cell phone calls during while on duty, the Respondent violated Section 8(a)(3) of the Act.

4. By discharging David Lee because of his activities in behalf of the Union, the Respondent violated Section 8(a)(3) of the Act.

5. By failing to reinstate unfair labor practice strikers upon the unconditional offer to return made in their behalf the Respondent violated Section 8(a)(3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, and having unlawfully refused to reinstate unfair labor practice strikers upon the unconditional offer to return made in their behalf, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from April 24, 2006, the date of their unconditional offer to return to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In reinstating the unfair labor practice

²⁸ In view of this finding, it is unnecessary to discuss the evidence relating to the complaint's alternative allegation that the strike was an economic strike, and the issues concerning the replacement of such strikers.

strikers, the Respondent has a duty to discharge, if necessary, strike replacements hired during the strike.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent, East Buffet and Restaurant, Inc., Huntington Station, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees as to who wrote a letter of protest, if they signed it, whether anyone forced them to sign, and why they signed it.

(b) Threatening employees with transfers to different assignments which it knew were not acceptable to employees, with closure of the restaurant if they joined the Union, by threatening that it would examine the immigration documentation of its employees if they joined the Union, and by telling its employees that it would be futile to join the Union.

(c) Criticizing its employees because of their protected, concerted activities, directing its employees not to speak to co-workers while on duty, telling its employees that they had to eat in two groups and not together, and prohibiting its employees from making or receiving cell phone calls during while on duty.

(d) Discharging or otherwise discriminating against any employee for supporting 318 Restaurant Workers' Union or any other union.

(e) Failing and refusing to reinstate unfair labor practice strikers upon the unconditional offer to return made in their behalf.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer David Lee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Lee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

²⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify David Lee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, offer full reinstatement to the following unfair labor practice strikers to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing if necessary, any replacements hired since April 24, 2006:

Hui Ma	Yu Zhen Wang
Yu Chuan Chu	Mei Ying Zou
Bi Chen	Ping Zhang
Li Feng Liu	Ping Yuan Wu
Xiu Zhu Lin	

(e) Make the above-named employees' whole for any loss of earnings and other benefits suffered as a result of the Respondent's refusal to reinstate them, from the date of their offer to return to work, April 24, 2006.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Lee and the refusal to reinstate the above nine employees, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discrimination will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Huntington Station, New York, copies of the attached notice marked "Appendix."³⁰ Inasmuch as the employee witnesses testified through a Chinese interpreter, it is directed that the notice be written in Chinese and English. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 31, 2005.

³⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 (j) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., April 3, 2007.

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Steven Davis
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your letters of protest, or about your union or protected concerted activities.

WE WILL NOT threaten you with transfers to different assignments, threaten you with closure of the restaurant, threaten that we will examine your immigration documentation or tell you that it would be futile to join the Union because of your union or protected concerted activities.

WE WILL NOT criticize you, direct you not to speak to your co-workers while on duty, tell you that you have to eat in two groups and not together, or prohibit you from making or receiving cell phone calls during while on duty because of your union or protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting 318 Restaurant Workers' Union or any other union.

WE WILL NOT fail or refuse to reinstate unfair labor practice strikers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer David Lee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL within 14 days from the date of the Board's Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing if necessary, any replacements hired since April 24, 2006:

Hui Ma
Yu Chuan Chu
Bi Chen
Li Feng Liu
Xiu Zhu Lin

Yu Zhen Wang
Mei Ying Zou
Ping Zhang
Ping Yuan Wu

WE WILL make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest from April 24, 2006.

- 5 WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of David Lee and the refusal to reinstate the above-named employees and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discriminatory actions will not be used against them in any way.

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EAST BUFFET AND RESTAURANT, INC.

(Employer)

Dated _____

By _____

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(Representative)

(Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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One MetroTech Center (North), Jay Street and Myrtle Avenue, 10th Floor

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

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718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

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COMPLIANCE OFFICER, 718-330-2862.